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# Unclear Legal Position of the Standstill Obligation in Light of Legal Certainty and the Protection of Legitimate Expectations

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# Summary

This thesis examines the intersection of EU procedural law and EU State aid law, focusing on the systemic friction between the enforcement of the Standstill obligation and the principles of legal certainty and the protection of legitimate expectations.

The first purpose is to identify the legal implications regarding the Standstill obligation under Article 108(3) TFEU when the procedure set out in Article 108 TFEU has been followed, and pursuant to this, the Member State has implemented the measure, but the positive authorization decision by the European Commission is subsequently annulled by the EU Courts.

The thesis concludes that the annulment by the EU Courts has a retroactive effect on the positive authorization decision. Subsequently, the already implemented State aid pursuant to the positive authorization decision is deemed to have been unlawfully implemented, and the beneficiary is thus obligated to repay the aid with interest from the date of implementation. This raises concerns about legal certainty and legitimate expectations.

The second purpose of this thesis is to assess whether the beneficiary of an already implemented State aid measure, which was authorized through a positive European Commission decision in which the Member State followed the correct procedure set out in Article 108 TFEU, but the positive authorization decision is subsequently annulled by the EU Courts, can plead the principles of legal certainty and the protection of legitimate expectations in order to prevent the recovery of such aid.

In order to answer this question, the thesis deploys the assessment developed by Xavier Groussot and concludes that the beneficiary of the implemented State aid measure cannot rely on these principles, as a plea in law, to prevent recovery. The main reason for this conclusion is that the beneficiary's competitors would not have adequate judicial protection, and in particular, their right to an effective remedy would be rendered non-existent.

These findings raise critical questions regarding the efficacy of the EU State aid framework. In circumstances requiring immediate liquidity, particularly during periods of crisis, the current framework appears insufficient to handle the expeditious response necessary for aid measures to achieve their intended impact. One suggestion for reform is for the Commission to inform beneficiaries, when authorizing a proposed measure by a Member State, that the wording of the Standstill obligation in reality implies that the final decision needs to become definitive. This would not resolve the issue of circumstances requiring immediate liquidity, but it would at least eliminate any legitimate expectations on the part of the beneficiary.

# Sammanfattning

Denna uppsats undersöker skärningspunkten mellan EU:s processrätt och EU:s statsstödsrätt, med fokus på den systemiska friktionen mellan genomförandeförbudet och principerna om rättssäkerhet och skyddet för berättigade förväntningar.

Det första syftet är att identifiera de rättsliga konsekvenserna avseende genomförandeförbudet enligt artikel 108.3 FEUF när det förfarande som föreskrivs i artikel 108 FEUF har följts, och medlemsstaten i enlighet därmed har genomfört åtgärden, när ett positivt godkännandebeslut från Europeiska kommissionen därefter ogiltigförklaras av EU-domstolarna.

Uppsatsen drar slutsatsen att EU-domstolarnas ogiltigförklaring har retroaktiv verkan på det positiva godkännandebeslutet. Följaktligen anses det statsstöd som redan genomförts i enlighet med det positiva godkännandebeslutet ha genomförts olagligt, och stödmottagaren är därmed skyldig att återbetala stödet med ränta från dagen för genomförandet. Detta väcker funderingar kring rättssäkerheten och berättigade förväntningar.

Det andra syftet med denna uppsats är att bedöma om stödmottagaren av en redan genomförd statsstödsåtgärd – vilken godkändes genom ett positivt kommissionsbeslut där medlemsstaten följde det korrekta förfarandet enligt artikel 108 FEUF, men där det positiva godkännandebeslutet därefter ogiltigförklaras av EU-domstolarna – kan åberopa principerna om rättssäkerhet och skydd för berättigade förväntningar för att förhindra återkrav av stödet.

För att besvara denna fråga tillämpar uppsatsen den bedömningsmodell som utvecklats av Xavier Groussot och drar slutsatsen att stödmottagaren av den genomförda statsstödsåtgärden inte kan förlita sig på dessa principer, som en grund för talan, för att förhindra återkrav. Huvudorsaken till denna slutsats är att stödmottagarens konkurrenter inte skulle ha ett adekvat domstolsskydd, och i synnerhet att deras rätt till ett effektivt rättsmedel skulle göras obefintlig.

Dessa slutsatser väcker kritiska frågor rörande effektiviteten hos EU:s statsstödsregelverk. Under omständigheter som kräver omedelbar likviditet, särskilt under krisperioder, framstår det nuvarande regelverket som otillräckligt för att hantera de skyndsamma åtgärder som krävs för att stödåtgärderna ska uppnå sin avsedda effekt. Ett reformförslag är att kommissionen, när den godkänner en medlemsstats föreslagna åtgärd, informerar stödmottagarna om att ordalydelsen i genomförandeförbudet i realiteten innebär att det slutliga beslutet måste vinna laga kraft. Detta skulle inte lösa problemet med omständigheter som kräver omedelbar likviditet, men det skulle åtminstone eliminera eventuella berättigade förväntningar hos stödmottagaren.

# Preface

Efter fyra och ett halvt år i Lund avslutas allt med mitt examensarbete.

Först vill jag tacka min handledare Xavier Groussot för hans feedback och råd under arbetets gång. Dessutom vill jag tacka Sigyn Monke på EU-kommissionen, som genom projektet Bollplank har bidragit med värdefulla synpunkter längs vägen.

Vidare vill jag tacka alla kollegor på Institutionen för handelsrätt vid Ekonomihögskolan för alla historier om Lund och samtal kring vägval efter examen.

Tack till alla underbara vänner och personer som jag har träffat tack vare juristprogrammet och min tid som student vid Lunds universitet.

Till sist vill jag tacka min familj, som alltid har stöttat mig och som förhoppningsvis kommer att fortsätta stötta mig efter juristprogrammet.

Nu har jag läst, tänkt och skrivit så gott jag har kunnat.

Fabian Vukic,

*Lund, den 24 maj 2026*

# Abbreviations

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| Charter | Charter of Fundamental Rights of the European Union |
| CJEU | Court of Justice of the European Union |
| Commission | European Commission |
| ECJ | European Court of Justice |
| EU | European Union |
| GC | General Court |
| SAS | Scandinavian Airlines System |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1 Introduction

## 1.1 Background

The administrative law of the European Union (EU) regarding State aid differs from the usual procedure for beneficial administrative acts. Instead of a beneficial act being applied for by the beneficiary, an application is submitted to the European Commission (Commission) by the Member State itself. Permission is sought to implement a measure whereby an undertaking or an entire industry is provided with a competitive advantage through public resources. For this system of prior control to be effective, Nicolaides highlights that it depends on compliance by the Member States. This compliance, in turn, depends on the rules being clear and comprehensible. Nicolaides further underscores that there is an inherent flaw, among others, in the system of State aid control. This flaw is that for mistakes made by the Member States, whether intentional or otherwise, the cost is ultimately borne by the beneficiaries of the measure.[1] To avoid the recovery of aid and the interest accrued between implementation and recovery, beneficiaries frequently invoke the principles of legal certainty and the protection of legitimate expectations. However, these pleas are notoriously difficult to succeed in within the framework of EU State aid proceedings.[2]

Despite this difficulty, a recent case has surfaced that has shed light on the issue of legal certainty and the protection of legitimate expectations in State aid proceedings. The case concerns the State aid measure of which Scandinavian Airlines System (SAS) was a beneficiary. This measure was conducted by both Denmark and Sweden in a collaboration. The background to the case is as follows.

In 2020, SAS required recapitalization after the COVID-19 pandemic caused the company significant financial distress. The Swedish and Danish governments, which were the airline's largest shareholders at the time, agreed to participate in a recapitalization plan. This was to be carried out through the States' subscription of hybrid bonds and new shares. On August 11, 2020, the States formally notified the Commission of the aid for approval, and it was approved by the Commission on August 17, 2020, under the legal basis of the Temporary Framework for State aid measures to support the economy during the COVID-19 outbreak.[3] The aid was implemented on October 26, 2020.

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[1] Phedon Nicolaides, 'Access to European Commission Guidance' (2008) 3 European State Aid Law Quarterly 231, 231.

[2] Adrien Giraud, 'A Study of the Notion of Legitimate Expectations in State aid Recovery Proceedings: "ABANDON ALL HOPE, YE WHO ENTER HERE"?' (2008) 45 Common Market Law Review 1399.

[3] Commission Communication, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C91I/1 (as amended).

When the preliminary framework of the COVID-19 outbreak was in force, Ryanair deployed a litigation strategy against approved State aid measures for competing airlines. The rationale was commercial; if State aid were withheld, more competitors would face bankruptcy, allowing Ryanair, which does not receive State aid compared to other airlines, to strengthen its market position.[4] This litigation strategy resulted in the annulment of the Commission's decision authorizing the State aid measure to SAS, by the General Court (GC) on May 10, 2023.[5]

Later, on November 29, 2023, the Commission issued a new decision approving the aid measure already implemented by Denmark and Sweden, subject to certain conditions. This decision, on July 9, 2024, was changed to a positive decision by the Commission.[6]

On November 20, 2024, SAS filed a lawsuit against the Swedish State in the Stockholm District Court. SAS is seeking a declaration from the court that it is under no obligation to pay interest to the State regarding the State aid received pursuant to the Commission's authorization, for the period between October 26, 2020, and November 29, 2023. These proceedings in the Stockholm District Court resulted in a reference for a preliminary ruling. The national court first asked, in essence, if the beneficiary has an obligation to pay interest during the period when the State aid measure was unlawful, considering the individual circumstances of the case. The second question on this matter is whether any exceptional circumstances in this situation may constitute a limitation of this obligation to pay interest. The reference for a preliminary ruling also included two questions about the calculation of interest.[7]

Parallel to this national proceeding in Sweden, a similar lawsuit was filed in the Copenhagen District Court by SAS against the Danish State.[8] These two national cases have resulted in the pending cases C-329/25 *SAS AB v Kingdom of Denmark* and C-442/25 *SAS AB v Staten genom Justitiekanslern* (Sweden). Depending on the outcome of these cases, we may see yet another situation where the beneficiary of State aid could ultimately suffer the legal consequences of the Member State's action. The above highlights important considerations on the interplay of judicial review, EU State aid law and the principles of legal certainty and the protection of legitimate expectations.

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[4] Christopher McMahon, 'State Aid Junkies, Viruses and the Aviation Industry: Ryanair's Litigation against Approved Aid Measures for Airlines during the Pandemic' (2021) 20 European State Aid Law Quarterly 249.

[5] Case T-238/21, *Ryanair v Commission (SAS II; COVID-19)*, ECLI:EU:T:2023:247.

[6] **Conditional decision**: Case SA.57543 and SA.58342, Scandinavian Airlines System (SAS) [2024] OJ L/2024/2549. **Positive decision**: Case SA.114648 and SA.114657, Amendment to SA.57543 and SA.58342, [2025] OJ C/2025/2780.

[7] *SAS AB v Staten genom Justitiekanslern*, Stockholms tingsrätt, T 20974-24 (4 July 2025, pending).

[8] *SAS AB v Kongeriget Danmark*, Københavns Byret, BS-33114/2024-KBH (14 May 2025, pending).

## 1.2 Purpose and Research Question

The purpose of this thesis is twofold. The first purpose is to assess and examine the notion and extent of the Standstill obligation in Article 108(3) Treaty on the Functioning of the European Union (TFEU), particularly the legal implications of an annulment by the EU Courts of a positive Commission decision regarding State aid. The second purpose builds on the outcome of the first part: to determine whether any lack of clarity regarding the Standstill obligation establishes the conditions for the application of the principle of legal certainty or the principle of the protection of legitimate expectations, as a plea in law, in order to prevent recovery of the aid in question.

In order to pursue the purpose of the first part of this thesis, the research question is formulated as follows:

- What are the legal implications regarding the Standstill obligation under Article 108(3) TFEU when the procedure set out in Article 108 TFEU has been followed and the Member State has implemented the measure, but the positive Commission decision authorizing the State aid in question is subsequently annulled by the EU Courts?

In order to address the main research question of the first part, the following sub-questions will be examined.

- What is the judicial review process for EU acts?

- What is the procedure for granting State aid measures under Articles 107 and 108 TFEU?

- What is the notion and purpose of the Standstill obligation?

In order to pursue the purpose of the second part of this thesis, the research question is formulated as follows:

- Can a beneficiary of an already implemented State aid measure, which was authorized through a positive Commission decision where the Member State followed the correct procedure set out in Article 108 TFEU, successfully plead the principles of legal certainty and the protection of legitimate expectations when the Commission's initial authorization decision is subsequently annulled by the Union judiciary, in order to prevent the recovery of that aid?

In order to address the main research question of the second part, the following sub-questions will be examined.

- What are the legal criteria for the use of the principles of legal certainty and the protection of legitimate expectations, as a plea in law?
- What interests do the EU Courts take into account in their assessments?

## 1.3 Method and Materials

### 1.3.1 Legal dogmatic method

This thesis employs the legal dogmatic method, since the primary objective of the thesis is to assess the current legal standing of the Standstill obligation in Article 108(3) TFEU and whether or not the principles of legal certainty and the protection of legitimate expectations can be applied in a given situation. The legal dogmatic method aims to identify and interpret the applicable law within a specific legal order, which in this thesis is the EU legal order. It focuses on the interpretation of *de lege lata*.[9]

The selection of legal instruments is made with regard to their importance in their respective fields of EU law. The main source of interpretation for Article 108(3) TFEU is the case law of the Court of Justice of the European Union (CJEU). This is even more crucial regarding the general principles of EU law, as the CJEU is their developer. This is supplemented by the decisions of the Commission, as they illustrate the interpretation of Article 108(3) TFEU and the general principles. Furthermore, the integration of legal doctrine and academic literature is undertaken in this thesis in order to achieve a comprehensive analysis, as it enhances the perspective and can help resolve any gaps in the unwritten law.

### 1.3.2 EU legal method

In combination with the legal dogmatic method, this thesis uses the EU legal method in order to determine the extent of the Standstill obligation in Article 108(3) TFEU, and to determine whether the principles of legal certainty and the protection of legitimate expectations can be applied in the given situation. The primary objective is to establish the law *de lege lata*.

The EU legal method entails a unique way of interpreting the EU legal system, which is characterized by a hierarchy of norms. At the top of the hierarchy stands EU primary law. This consists of the Treaties, in particular the Treaty on European Union (TEU) and the TFEU, as well as the Charter of Fundamental Rights of the European Union (Charter), Treaty Amendments,

[9] Jan Kleiman, in Maria Nääv and Mauro Zamboni (eds), *Juridisk metodlära* (2nd edn, Studentlitteratur 2018) 21–22.

Protocols to the Treaties, and Accession Treaties.[10] Subordinate to this is secondary law, which is derived from EU primary law and includes legal instruments such as regulations, directives and decisions.[11] The general principles of EU law form an integral part of the EU legal system. Their position within the hierarchy of norms is difficult to categorize and remains nuanced. These principles provide guidance and aid the Union in interpretation when the administration encounters ambiguities; furthermore, some of these principles are also constitutional in nature.[12] In one case, the European Court of Justice (ECJ) applied a principle of EU law against the literal wording of the Treaties themselves.[13]

While several of these principles are enshrined within the Charter or the Treaties,[14] some remain in unwritten form. For example, the principles of legal certainty and the protection of legitimate expectations.[15]

The case law of the ECJ and the GC is also an important source of law in the Union. These courts play a crucial role in developing the law. However, their mandate is formally restricted to interpreting and applying sources of EU law.[16] The CJEU stipulates a specific way of interpreting EU law. This is due to the special characteristics of the EU legal order, as the EU is a special stage of development of international law, and its distinctive supranationality does have consequences for the interpretative methods of the CJEU.[17] The different interpretative methods that the CJEU has developed take into account the special features of EU law as a supranational legal system.[18]

The interpretative approach of the CJEU is divided into five distinctive interpretation methods. The approach begins with *Grammatical Interpretation*. This can lead to complexities because the EU is a pluralistic legal system where provisions in all official languages are equally binding and authentic. The second method is the *Systematic Interpretation*, which entails an assessment of the function of a provision within the structure of the law and in

[10] Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 655.

[11] Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 630.

[12] Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 684–685; Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 29.

[13] Case C-70/88, *Parliament v Council*, ECLI:EU:C:1990:217, paras 25–27.

[14] Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 686–687.

[15] Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 687–689.

[16] Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 753.

[17] Rudolf Streinz, in Karl Riesenhuber (ed), *European Legal Methodology* (2nd edn, Intersentia 2021) 161.

[18] Rudolf Streinz, in Karl Riesenhuber (ed), *European Legal Methodology* (2nd edn, Intersentia 2021) 165.

relation to other provisions. The third, and perhaps the most significant method, is the *Teleological Interpretation*. This means the CJEU interprets provisions with respect to the objectives stated in the Treaties. The core rationale is *effet utile*[19] in achieving EU objectives, such as the functioning of the internal market. This method is also the principal driver behind the development of the structural principles of EU law.[20] The fourth method is the *Historical Interpretation*, which seeks to identify the true intention of the historical legislator. The final method is the use of *Comparative Law*, which is also used in parallel with the other methods of interpretation.[21]

There is no established hierarchy between the various methods of interpretation used by the CJEU. Instead, the Court adopts a pluralistic approach, applying these methods concurrently or in combination. However, the *Grammatical Interpretation* is seen as the necessary starting point.[22]

In order to achieve the purpose of this thesis, it mainly uses the Treaties and the case law of the CJEU to interpret the provisions of primary law. In certain respects, it is necessary to examine the procedural framework of EU State aid law, which consists primarily of Articles 107–108 TFEU and the Procedural Regulation. To ascertain how the EU administration interprets relevant legal provisions, reference is made to the decisions of the Commission. Furthermore, regarding the general principles of EU law—as the CJEU is the primary developer of these principles—this thesis utilizes the Court's case law to interpret the meaning of the relevant general principles. A more detailed examination of the methodology for interpreting the general principles of EU law is set out in Chapter 5 to preserve the thematic coherence of the analysis. The integration of legal doctrine and academic literature ensures a comprehensive analysis by engaging with existing scholarly perspectives and theoretical frameworks. This approach remains crucial even though the CJEU never formally cites academic commentary in its rulings.[23]

## 1.4 Previous Research

The current state of research on this particular subject and research question is limited. There are few diverging views regarding both the Standstill obligation and the applicability of the principles of legal certainty and the protection of legitimate expectations, and authors do not elaborate extensively on

[19] Swedish: ändamålsenlig verkan; English: practical effect.

[20] Rudolf Streinz, in Karl Riesenhuber (ed), *European Legal Methodology* (2nd edn, Intersentia 2021) 167–173; Jörgen Hettne and Ida Otken Eriksson, *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts Juridik 2011) 168–170.

[21] Rudolf Streinz, in Karl Riesenhuber (ed), *European Legal Methodology* (2nd edn, Intersentia 2021) 167–173.

[22] Rudolf Streinz, in Karl Riesenhuber (ed), *European Legal Methodology* (2nd edn, Intersentia 2021) 173–174.

[23] Jörgen Hettne and Ida Otken Eriksson, *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts Juridik 2011) 120–122.

them. With regard to the procedural framework of the EU legal order, the works of Lenaerts are of great importance.[24] Within the EU State aid framework, the works of Bacon and Quigley are extensive and useful.[25] Furthermore, the works of Groussot regarding the applicability and method of assessment of the principle of the protection of legitimate expectations is of fundamental importance.[26] Finally, the article by Giraud has been important in highlighting key aspects of this study.[27]

## 1.5 Delimitations

The subject of EU procedural law, EU State aid law and the general principles of EU law are all extensive and offer numerous interesting aspects. Nonetheless, due to the limited scope of this thesis and to ensure a narrow and streamlined thesis, the following delimitations are made in the respective areas of EU law.

*EU Procedural Law*

Treaty provisions, such as Article 258, 259, 265 TFEU fall outside the scope of this thesis. Furthermore, the infringement of the general principles of EU law is examined exclusively as a ground of annulment under Articles 263 and 267 TFEU.

*EU State aid Law*

Articles 106 and 109 TFEU are excluded from this research. While certain aspects of Article 107 TFEU are examined, the primary focus of this thesis is Article 108 TFEU, particularly its third paragraph. Furthermore, this research covers neither the de minimis framework nor the block-exemptions under Articles 107 and 108 TFEU. The focus also excludes existing State aid measures and the Commission's substantive compatibility assessment.

*General Principles of EU Law & General*

This thesis mainly examines the principles of legal certainty and the protection of legitimate expectations. It excludes the aspect of fundamental rights, specifically legal certainty as a fundamental right, as well as obligations

[24] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023).

[25] Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017); Conor Quigley, *European State Aid Law and Policy* (4th edn, Hart Publishing 2022).

[26] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006).

[27] Adrien Giraud, 'A Study of the Notion of Legitimate Expectations in State aid Recovery Proceedings: "ABANDON ALL HOPE, YE WHO ENTER HERE"?' (2008) 45 Common Market Law Review 1399.

arising under the European Convention on Human Rights and the case law of the European Court of Human Rights.

## 1.6 Outline

The structure of the thesis consists of seven Chapters, with the core questions divided into two distinct parts in order to enhance readability. The *first Chapter* establishes the context in which the background, purpose, and research questions are presented. It also presents the methods, the delimitations, previous research, and the structure of the thesis.

The first part addresses the problematic issue of the Standstill obligation when subject to judicial review and consists of Chapter two, three and four. The *second Chapter* presents the judicial review system of the EU legal order in light of EU State aid proceedings. It focuses mainly on the principle of judicial protection and Articles 263 and 267 TFEU. The *third Chapter* outlines the procedural framework of EU State aid law, in which Articles 107 and 108 TFEU are of particular importance, together with the Procedural Regulation. The *fourth Chapter* examines the legal effect of the Standstill obligation when a positive authorization decision by the Commission is annulled by the Union judiciary. The conclusion of this Chapter is the foundation for the assessment in *Part 2*.

The second part assesses the applicability of the principles of legal certainty and the protection of legitimate expectations in light of the conclusions drawn in *Part 1*. It consists of Chapter five, six and seven. The *fifth Chapter* lays down the foundation for the general principles of EU law, and in particular, the principles of legal certainty and the protection of legitimate expectations. The *sixth Chapter* provides the foundation and sets out the application of the principles of legal certainty and the protection of legitimate expectations. It also assesses the applicability of these principles in a given situation. The *seventh Chapter* concludes the thesis by drawing conclusions on certain aspects of this issue and providing suggestions to avoid these problematic elements.

# Part 1

# 2 The Judicial Review Process in the EU

## 2.1 The Importance of the Principle of Judicial Protection in Judicial Review Proceedings

Article 47 of the Charter provides the fundamental right to an effective remedy and to a fair trial. This provision, according to the ECJ, constitutes a reaffirmation of the principle of effective judicial protection.[28] The principle of judicial protection contains various elements, but in particular, the rights of the defence, the principle of equality of arms, the right of access to a court or tribunal, and the right to be advised, defended and represented.[29] Furthermore, the provision of Article 19(1) TEU states that national courts shall provide sufficient remedies to ensure effective legal protection, in the fields covered by EU law.

The scope of these provisions is slightly different. The scope of Article 19(1) TEU extends to the fields covered by EU law. The scope of Article 47 of the Charter applies, according to Article 51 of the Charter, when the Union or the Member States are implementing EU law. It is considered that the scope arising from Article 19(1) TEU is broader than the scope under Article 51 of the Charter.[30]

Central to the objective of this thesis is the right to an effective remedy. This is because, depending on the interpretation of the Standstill obligation, a violation of EU State aid rules may not be effectively remedied, thus constituting a violation of this right. According to the ECJ, the EU legal order is ensured through judicial review of compliance with Union law. This constitutes a complete system of legal remedies which is divided between the Union judiciary and the judiciaries of the Member States.[31] Furthermore, this right to an effective remedy is considered by the ECJ to be of the essence of the rule of law.[32] This right is formulated, by the ECJ, as the right for individual parties to challenge, before the courts, the legality of any decision relating to the

[28] Case 222/84, *Johnston*, ECLI:EU:C:1986:206, paras 58–59; Case C-348/16, *Sacko*, ECLI:EU:C:2017:591, para 31; Case C-662/17, *E.G.*, ECLI:EU:C:2018:847, para 47.

[29] Case C-348/16, *Sacko*, ECLI:EU:C:2017:591, para 32; Case C-662/17, *E.G.*, ECLI:EU:C:2018:847, para 48.

[30] Herwig CH Hofmann, in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing 2021) 1263; Case C-562/12, *Liivimaa Lihaveis*, ECLI:EU:C:2014:2229, para 62; Case C-299/95, *Kremzow*, ECLI:EU:C:1997:254, para 16.

[31] Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, paras 56–57.

[32] Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para 73.

application of an EU act to them.[33] In order for the remedy to be effective, it must include the substantive relief and not be merely symbolic.[34]

The principle of judicial protection is, however, not absolute. This limitation of the right to effective judicial protection is permissible through a balancing of interests. This exercise is derived from Article 52 of the Charter and the case law of the CJEU, which essentially state that any limitation is subject to the principle of proportionality, and that such restrictions must be necessary and genuinely meet objectives of general interest.[35]

## 2.2 Direct Judicial Review – Article 263 TFEU

The action for annulment, which Article 263 TFEU regulates, is the core procedure within the system of judicial protection in the EU.[36] Under Article 263 TFEU, the CJEU has exclusive jurisdiction to review the legality of acts adopted by the EU and to declare them void.[37]

### 2.2.1 The issue of a reviewable act

The first requirement regarding the admissibility of an action for annulment under Article 263 TFEU is whether the measure constitutes a reviewable act. This issue is subsequently broken down into two central aspects, (1) the existence of a contested act, and (2) the binding nature of the act.[38]

The contested act needs to be an act that still exists. A non-existent act cannot be declared void.[39] The ECJ and the GC can under their own motion declare the act as non-existent, under the rules regarding the absolute bar to proceedings.[40] The notion of a binding act encompasses all acts that are adopted by the institutions of the EU and are intended to have binding effects. This applies regardless of their form.[41] In order for the CJEU to assess whether the contested act is intended to have legal effects, it is necessary to look at its

[33] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para 31; Case C-583/11 P, *Inuit Tapiriit Kanatami v Parliament and Council*, ECLI:EU:C:2013:625, para 91.

[34] Case 222/84, *Johnston*, ECLI:EU:C:1986:206, para 19.

[35] Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, ECLI:EU:C:2010:146, para 63.

[36] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 275.

[37] Case C-219/17, *Berlusconi and Fininvest*, ECLI:EU:C:2018:1023, para 42.

[38] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 277.

[39] Case T-24/20, *Junqueras i Vies v Parliament*, ECLI:EU:T:2020:601, para 106.

[40] Rules of Procedure of the Court of Justice [2012] OJ L265/1, Article 150; Rules of Procedure of the General Court [2015] OJ L105/1, Article 129.

[41] Case 22/70, *Commission v Council*, ECLI:EU:C:1971:32, para 39; Case C-16/16 P, *Belgium v Commission*, ECLI:EU:C:2018:79, para 31; Case T-245/17, *Viasat v Commission*, ECLI:EU:T:2021:128, para 110.

substance. This assessment takes into account the content of the act, the context in which it was adopted, and the powers of the institution that adopted it.[42] With regard to recommendations and opinions, these do not produce any legal effects according to Article 288 TFEU.

In State aid proceedings, some decisions are subject to judicial review, and some are not. Confirmatory acts, which are acts that are purely confirmatory of an earlier decision with no new factors, cannot be subject of an action for annulment.[43] When the Commission decides upon a complaint regarding State aid, and subsequently in accordance with good administration, sends an information letter to the complainant, that act cannot be the subject of an action for annulment. It is only the decision, which is in turn addressed to the Member State, that can be subject to annulment.[44]

### 2.2.2 The issue of legal standing

The question of legal standing is laid down in Article 263 TFEU. The article contains three different paragraphs concerning legal standing. The second and third paragraphs of Article 263 TFEU contain the provisions regarding the legal standing of privileged applicants and semi-privileged applicants. In State aid proceedings, the vast majority of decisions adopted by the Commission are addressed to the Member States, and thus, they are privileged applicants in accordance with Article 263 TFEU.[45] With regard to the purpose of this thesis, the legal standing of these privileged and semi-privileged applicants will not be further elaborated.

The fourth paragraph of Article 263 TFEU contains the provision regarding the legal standing on non-privileged applicants. This provision provides three situations in which a person can institute proceedings again an EU act.

(1) When an act is addressed to them.

(2) When an act is of direct and individual concern to them.

(3) When an act is a regulatory act of which is of direct concern to them and does not entail implementing measures.

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[42] Case C-599/15 P, *Romania v Commission*, ECLI:EU:C:2017:801, para 48.

[43] Case C-480/93 P, *Zunis Holding v Commission*, ECLI:EU:C:1996:1, para 14; Case T-330/09, *RapidEye v Commission*, ECLI:EU:T:2011:48, para 24.

[44] Case C-367/95 P, *Commission v Sytraval and Brink's France*, ECLI:EU:C:1998:154, para 45; Case T-56/13, *Club Hotel Loutraki v Commission*, ECLI:EU:T:2014:183, para 21.

[45] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L248/9, Article 31; Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) 509.

In the first situation, where an act is addressed to them, the person addressed can institute proceedings against the act. This process is straightforward and involves no further complexity.

In the second situation, where an act is of *direct* and *individual concern* to the applicant, it is necessary to assess these two cumulative requirements separately.[46] It is for the applicant to produce adequate proof that it is concerned by the decision on the date on which it is adopted.[47]

The requirement of *direct concern*, is further divided into two cumulative criteria. First, (1) the contested measure must be capable of producing effects on the applicant's legal situation; (2) second, the measure leaves no discretion as to its implementation to its addressees.[48] With regard to the second criterion, the idea is that there cannot be any genuine discretion regarding the implementation of the measure by the implementing addressee.[49] In the context of State aid proceedings, beneficiaries of a measure, are generally considered to be directly concerned by a Commission decision not to authorize State aid.[50] Further, it is not enough for the applicant to state that it is a competitor and thus the applicant may be affected by the State aid.[51] The applicant must adequately explain the reason why the decision of the Commission places it in an unfavourable competitive position and thus produces an effect on its legal situation.[52]

As for the *individual concern* requirement, the act needs to affect the applicants by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually.[53] The burden of proof lies on the applicant to demonstrate that the act affects them substantively, just as if the act were addressed to them. This is considered by Lenaerts

[46] Case C-282/21 P, *Commission v Braesch and Others*, ECLI:EU:C:2023:58, para 124.

[47] Joined Cases C-587/13 P and C-588/13 P, *Banco Bilbao Vizcaya Argentaria, SA v Commission*, ECLI:EU:C:2015:18, para 52.

[48] Case C-348/20 P, *Nord Stream 2 v Parliament and Council*, ECLI:EU:C:2022:548, para 43; Case C-465/16 P, *Council v Growth Energy and Renewable Fuels Association*, ECLI:EU:C:2019:155, para 69.

[49] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 328–329; Case C-372/08 P, *Atlantic Dawn and Others v Commission*, ECLI:EU:C:2009:287, para 41.

[50] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416, para 57.

[51] Joined Cases C-455/13 P, C-457/13 P and C-460/13 P, *Confederazione Cooperative Italiane v Commission*, ECLI:EU:C:2015:616, paras 47–49.

[52] Joined Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori Srl v Commission*, ECLI:EU:C:2018:873, para 47.

[53] Case C-33/14 P, *Mory and Others v Commission*, ECLI:EU:C:2015:609, para 93; Case 25/62, *Plaumann v Commission*, ECLI:EU:C:1963:17, page 107.

to be a particularly strict requirement.[54] It is also important to point out that the applicant needs to show the CJEU that they were part of a closed scope of persons at the time when the act was adopted.[55]

The third situation when a person has legal standing is when the following three cumulative requirements are met: (1) it is a regulatory act, (2) the applicant needs to be directly concerned, and (3) the act does not entail implementing measures.[56]

The notion of a regulatory act is understood as covering any act of general application except for legislative acts.[57] The Commission has challenged this interpretation, but the ECJ has clarified that there are not any non-legislative acts of general application that are not covered by the concept of a regulatory act.[58] Thus, the notion of a regulatory act covers any act of general application that has not been adopted in accordance with the ordinary or special legislative procedure within the meaning of Article 289 TFEU.[59] A final decision by the Commission regarding State aid is not a legislative act and thus constitutes a regulatory act.[60]

With regard to the notion of direct concern, the provision has the same interpretation as the other limb in Article 263 TFEU.[61] Thus, see the paragraph above.

The notion of whether a regulatory act entails implementing measures shall be assessed by reference to the applicant and from the applicant's perspective.[62] The assessment shall also only refer to the subject matter of the action, and for those instances where the applicant only seeks partial annulment, it shall only consider the substance of that part.[63] The CJEU has taken a broad interpretation in its case law regarding the notion of whether a regulatory act

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[54] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 331; Case C-408/15 P and C-409/15 P, *Ackermann Saatzucht and Others v Parliament and Council*, ECLI:EU:C:2016:893, paras 37–39.

[55] Joined Cases C-106/19 and C-232/19, *Italian Republic and Comune di Milano v Council and Parliament*, ECLI:EU:C:2022:568, para 70.

[56] Case T-157/21, *RG v Council*, ECLI:EU:T:2021:829, para 33.

[57] Case C-583/11 P, *Inuit Tapiriit Kanatami v Parliament and Council*, ECLI:EU:C:2013:625, paras 58–61.

[58] Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori srl v Commission*, ECLI:EU:C:2018:873, paras 24–28.

[59] Case T-645/20, *Dual Star Logistic and Others v Parliament and Council*, ECLI:EU:T:2021:507, para 22.

[60] Case T-219/13, *Ferracci v Commission*, ECLI:EU:T:2016:485, paras 51–55.

[61] Case C-453/19 P, *Deutsche Lufthansa v Commission*, ECLI:EU:C:2021:608, paras 82–84.

[62] Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, para 30; Case C-456/13 P, *T & L Sugars and Sidul Açúcares v Commission*, ECLI:EU:C:2015:284, para 32; Case C-244/16 P, *Industrias Químicas del Vallés v Commission*, ECLI:EU:C:2018:177, para 45.

[63] Case C-244/16 P, *Industrias Químicas del Vallés v Commission*, ECLI:EU:C:2018:177, para 46.

entails implementing measures.[64] In the context of State aid proceedings, this requirement shall be evaluated through a case-by-case assessment.[65]

### 2.2.3 Grounds for annulment

Article 263 TFEU sets out four different grounds for annulment upon which the CJEU can annul an act of the Union. These are: (1) lack of competence, (2) infringement of an essential procedural requirement, (3) infringement of the Treaties or of any rule of law relating to their application, and (4) misuse of powers.

The ground *lack of competence* consists of three aspects. These are the substantive, territorial, and personal aspects.[66] The substantive aspect is that the institutions of the EU are only empowered to act in their respective policy areas assigned to them by the Treaties. If they adopt an act outside of these areas, it may be annulled.[67] Consequently, the dispute typically centres on the legal basis of the contested act.[68] Lenaerts highlights that the choice of the correct legal basis for a contested act is of fundamental importance. Consequently, even if an EU institution possesses the competence to act under a different provision, reliance on an incorrect legal basis remains a valid ground for annulment.[69] Regarding the territorial aspect, Union acts may apply to persons established outside the EU, provided that such application remains in conformity with international law.[70] The personal aspect is a question of the delegation of powers. In the EU legal order, the institutions can, under some conditions delegate powers to other institutions, to Member States, to international organizations, or to other agencies.[71] Should these conditions for delegating powers, not be fulfilled and an institution nevertheless delegates power to another body, or should that body fail to respect the limits of that delegation, the act may be annulled on the ground of lack of competence.[72]

The ground *infringement of an essential procedural requirement* has the purpose of ensuring that measures of the Union are formulated with all due care

[64] Case T-822/19, *Asoliva and Anierac v Commission*, ECLI:EU:T:2021:246, paras 31–35; Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 339.

[65] Case T-219/13, *Ferracci v Commission*, ECLI:EU:T:2016:485, paras 56–70.

[66] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 379.

[67] Case 294/83, *Les Verts v Parliament*, ECLI:EU:C:1986:166, paras 51–55; Case T-684/19 and T-704/19, *MEKH v ACER*, ECLI:EU:T:2022:138, paras 140–141.

[68] Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para 106.

[69] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 380.

[70] Case C-286/90, *Poulsen and Diva Navigation and Others*, ECLI:EU:C:1992:453, paras 21–29.

[71] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 380.

[72] Case C-696/15 P, *Czech Republic v Commission*, ECLI:EU:C:2017:595, para 75; Case C-355/10, *Parliament v Council*, ECLI:EU:C:2012:516, para 64.

and prudence.[73] When an essential procedural requirement has been breached, the CJEU can only rely on this as a ground for annulment when the infringement might have resulted in a substantively different act;[74] or when the irregularity makes judicial review impossible;[75] or when it breaches a fundamental institutional rule.[76] The main aspects of essential procedural requirements are as follows: (1) the duty to consult, (2) the requirement to hear the addressee, (3) the duty of confidentiality, (4) compliance with internal procedural rules, and, (5) the requirement to provide a statement of reasons.[77]

The ground *infringement of the Treaties or of any rule of law relating to their application* encompasses any infringement of any superior-ranking EU law.[78] This superior-ranking EU law refers to the Treaties,[79] Protocols and Annexes to the Treaties,[80] the Charter,[81] Accession Treaties and Acts and the general principles of EU law.[82] With regard to the purpose of this thesis, this covers specifically the principles of legal certainty and the protection of legitimate expectations.[83] In the context of the general principles of EU law in Article 263 TFEU, these also include provisions or principles of international law. This occurs when (1) the Union takes the place of Member States in conventions they previously concluded,[84] (2) the Union itself concludes international agreements,[85] and (3) through the application of customary international law.[86]

The notion of *infringement* consists both of the misapplication of the law and of an error in determining the factual basis on which the application of EU

[73] Case 6/54, *Netherlands v High Authority*, ECLI:EU:C:1955:5, page 112; Case T-479/20, *Eurobolt and Others v Commission*, ECLI:EU:T:2022:304, para 73.

[74] Case 150/84, *Bernardi v Parliament*, ECLI:EU:C:1986:167, para 28.

[75] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 382.

[76] Case 138/79, *Roquette Frères v Council*, ECLI:EU:C:1980:249, para 33; Case 139/79, *Maizena v Council*, ECLI:EU:C:1980:250, para 34.

[77] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 383.

[78] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 390.

[79] Article 1(3) TEU and Article 1(2) TFEU.

[80] Article 51 TEU.

[81] Article 6 TEU.

[82] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 390.

[83] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416, paras 147–167; Case C-482/17, *Czech Republic v Parliament and Council*, ECLI:EU:C:2019:1035, paras 153–157; Case T-217/17, *FVE Holýšov I and Others v Commission*, ECLI:EU:T:2019:633, paras 66–85.

[84] Opinion 2/15, *EU-Singapore Free Trade Agreement*, ECLI:EU:C:2017:376, para 248; Joined Cases 21/72 to 24/72, *International Fruit Company*, ECLI:EU:C:1972:115, paras 6–7 and 10–18.

[85] Article 216 TFEU.

[86] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *Åhlström Osakeyhtiö v Commission*, ECLI:EU:C:1988:447, paras 18–23.

law is later based upon.[87] In certain areas, the CJEU is reluctant to review the assessments made by EU institutions regarding economic facts and circumstances of the case. Consequently, the Court's review focuses on whether the institution complied with relevant procedural rules, the requirement to provide a statement of reasons, whether the facts have been accurately stated, and whether there has been any manifest error of assessment.[88] This is especially the case in State aid proceedings. The CJEU has stated that these decisions often involve complex economic assessments, and thus the Court must confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the obligation to provide a statement of reasons, whether the facts on which the contested finding was based have been accurately stated, and whether there has been any manifest error of assessment or a misuse of powers.[89]

The ground *misuse of powers* arises when an institution uses its powers for purposes other than those for which they were conferred.[90] The approach of assessing a misuse of powers follows an objective approach, meaning that an assessment of the subjective grounds behind the act is not needed. The objective approach consists of assessing the objectives of the act and comparing these with the outcome of the act. If the outcome diverges from the powers the institution was conferred, then it is a sufficient basis for annulment.[91]

## 2.3 Indirect Judicial Review – Article 267 TFEU

### 2.3.1 General

The validity of EU acts can be challenged through preliminary rulings by the ECJ and GC, according to Article 19(3) TEU and Article 267 TFEU. The purpose of the mechanism for preliminary rulings is to ensure uniformity in the application of EU law and to establish effective cooperation between the CJEU and the national courts and tribunals.[92] Article 4(3) TEU states that the Member States shall take any appropriate measures to ensure the fulfilment of the Treaties. The national courts and tribunals are considered to be

[87] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 391.

[88] Joined Cases C-341/06 P and C-342/06 P, *Chronopost and La Poste v UFEX and Others*, ECLI:EU:C:2008:375, para 143; Case C-928/19 P, *EPSU v Commission*, ECLI:EU:C:2021:656, para 96.

[89] Joined Cases C-341/06 P and C-342/06 P, *Chronopost and La Poste v UFEX and Others*, ECLI:EU:C:2008:375, para 143.

[90] Case 817/79, *Buyl and Others v Commission*, ECLI:EU:C:1982:36, para 28; Case C-400/99, *Italy v Commission*, ECLI:EU:C:2005:275, para 38.

[91] Case T-271/10 RENV II, *H v Council*, ECLI:EU:T:2020:548, para 77; Koen Lenaerts and others, EU Procedural Law (2nd edn, Oxford University Press 2023) 392.

[92] Case C-221/88, *Busseni*, ECLI:EU:C:1990:84, para 13.

institutions of the Member States, and thus the obligation to follow the Treaties also applies to them, despite their independence.[93]

### 2.3.2 Interpretation and validity

Article 267 TFEU provides for the CJEU to give preliminary rulings regarding (a) the interpretation of the Treaties, and (b) the validity and interpretation of acts of the Union. A reference to the CJEU can only be made if there is a case present before the national court or tribunal, in which it is called upon to give a decision of judicial nature. An administrative decision by a judicial body that does not involve the resolution of a legal dispute is not regarded as an exercise of the judicial function.[94] Article 267(2–3) TFEU states when courts or tribunals may or must refer a question to the ECJ. The notion of the expression *Court or Tribunal* is an autonomous concept of EU law and thus the national categorization is not determinative.[95] Several factors are part of the assessment by the CJEU, namely: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies the rule of law, and whether it is independent.[96]

### 2.3.3 What acts are subject to judicial review under Article 267 TFEU?

According to Article 267 TFEU, this provision explicitly refers to acts of Union institutions, including those of the Commission. Preliminary rulings can address the validity of both binding and non-binding acts. The CJEU has held that non-binding acts cannot be regarded as having no legal effect. For instance, the CJEU held that national courts are bound to take recommendations into consideration in national disputes.[97] With regard to acts within the State aid framework, both the Commission's communications regarding State aid and its decisions concerning State aid are acts that can be reviewed under this provision.[98]

### 2.3.4 Special characteristics of Article 267 TFEU in comparison to Article 263 TFEU

[93] Case C-416/17, *Commission v France*, ECLI:EU:C:2018:811, paras 106–107.

[94] Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723, paras 56–57; Case C-182/00, *Lutz and Others*, ECLI:EU:C:2002:19, paras 13–14; Case 138/80, *Barker*, ECLI:EU:C:1980:162, para 4.

[95] Case C-24/92, *Corbiau*, ECLI:EU:C:1993:118, para 15.

[96] Case C-274/14, *Banco de Santander*, ECLI:EU:C:2020:17, para 51; Case 61/65, *Vaassen-Göbbels*, ECLI:EU:C:1966:39, page 273; Case C-53/03, *Syfait and Others*, ECLI:EU:C:2005:333, para 29.

[97] Case C-322/88, *Grimaldi*, ECLI:EU:C:1989:646, para 18.

[98] Case C-526/14, *Kotnik and Others*, ECLI:EU:C:2016:570, paras 31–34.

Some distinctions between the procedures laid down in Article 263 TFEU and Article 267 TFEU are important. The first one is that the preliminary ruling procedure is not limited to a time limit. In the *TWD* case[99], the situation was that a Member State implemented a State aid measure without notifying the Commission. The Commission later declared through a decision that the aid was unlawful and subsequently requested the Member State to recover it. The Member State pointed out to the beneficiary that it could bring an action against the decision through Article 263 TFEU, but the beneficiary did not bring an action. Later, when the Member State started proceedings to recover the aid, the beneficiary appealed that decision to a national court. Eventually, the CJEU was referred a question regarding whether the beneficiary was time-barred from pleading the unlawfulness of the Commission's decision because the beneficiary did not bring an action within the time limit of Article 263 TFEU. The CJEU stated that a decision addressed to a person which is not challenged within the time limit in Article 263 TFEU is final and binding on that person. This final and binding nature makes it impossible for the person concerned to bring proceedings before a national court or tribunal, in order to assess its validity through the preliminary ruling procedure, as stated in Article 267 TFEU. The CJEU uses the principle of legal certainty as a reason for this limitation. It argues that if an act of the Union, which has legal effects, could be challenged for an indefinite period of time, it would undermine the principle of legal certainty. Thus, a beneficiary cannot call into question the lawfulness of a decision by the Commission regarding State aid through Article 267 TFEU, when the beneficiary could have challenged the decision through Article 263 TFEU.[100]

The rule derived from the *TWD* case[101], according to Tridimas, requires a restrictive application. He argues that in order to apply this rule, it should be manifestly clear that the person concerned had *locus standi* to bring an action under Article 263 TFEU. This application gives rise to complications. A person who is challenging a measure under Article 267 TFEU has to establish that they reasonably held the view that they did not have *locus standi* under Article 263 TFEU. This means that the national court or tribunal has to assess whether the person had direct and individual concern. This would, according to Tridimas, not better serve the purpose of the principle of legal certainty, because it imports the difficulties associated with Article 263 TFEU into Article 267 TFEU. He argues that this would create a situation where the national court has to assess the *locus standi* of Article 263 TFEU in a procedure for a preliminary ruling as set out in Article 263 TFEU. According to Tridimas, because of these complications and the unwanted situations that may

[99] Case C-188/92, *TWD Textilwerke Deggendorf*, ECLI:EU:C:1994:90.

[100] Case C-188/92, *TWD Textilwerke Deggendorf*, ECLI:EU:C:1994:90, paras 3–8, 13–25.

[101] Case C-188/92, *TWD Textilwerke Deggendorf*, ECLI:EU:C:1994:90.

arise, the application of the rule derived from the *TWD* case[102] should be applied restrictively.[103]

The second distinction concerns the parties to the procedure. It is the national court that seeks the preliminary ruling from the CJEU, and not the parties to the national dispute. It is for the referring court to decide which questions to send to the CJEU; consequently, the Court will not take into account whether one of the parties wants to change the referred question.[104]

The third distinction is that the CJEU is not limited to a specified ground of invalidity.[105] Although it follows from the case law of the CJEU that the Court will examine the validity of an EU act in light of the grounds of invalidity set out in the order for reference, if there are no precise reasons provided by the referring court, then those referred questions will be inadmissible.[106] Also, the CJEU may rephrase a referred question from a question of interpretation into a question of validity. In order for the Court to do this, sufficient information is needed in the national court's decision to refer the question to the CJEU.[107] The CJEU may also find it necessary, in light of the order for reference and observations lodged before it, to examine the validity in light of other grounds, in order to give a useful answer.[108] Furthermore, Lenaerts states that the CJEU may supplement the grounds of invalidity, as set forth in the order for reference, in light of matters that have come to light in the course of the legal argument before the CJEU.[109]

Regarding the intensity of the factual review, the CJEU, when assessing the legality of the contested act, may exercise the same level of scrutiny as that applied in proceedings under Article 263 TFEU.[110]

## 2.4 The Legal Effects of the Judicial Review

The legal effects of a judgment pursuant to Article 263 TFEU or Article 267 TFEU share several similarities, they also differ in key respects. According

[102] Case C-188/92, *TWD Textilwerke Deggendorf*, ECLI:EU:C:1994:90.

[103] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 249–250.

[104] Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, ECLI:EU:C:2010:363, para 63.

[105] Joined Cases 21/72 to 24/72, *International Fruit and Others*, ECLI:EU:C:1972:115, para 5; Case C-162/96, *Racke*, ECLI:EU:C:1998:293, para 26.

[106] Case C-547/14, Philip Morris, ECLI:EU:C:2016:325, para 50; Case C-686/18, *OC and Others*, ECLI:EU:C:2020:567, para 64.

[107] Case C-300/07, *Hans & Christophorus Oymanns*, ECLI:EU:C:2009:358, para 40–47; Case C-338/10, *GLS*, ECLI:EU:C:2012:158, paras 14 and 17.

[108] Case C-309/10, *Agrana Zucker*, ECLI:EU:C:2011:531, para 23.

[109] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 462.

[110] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 464.

to Article 264(1) TFEU, which concerns Article 263 TFEU, the CJEU shall declare the act to be void if the action is well-founded. This judgment has an *erga omnes* effect, meaning that the judgment has a general effect throughout the EU legal order.[111] This effect is different from the one produced by a preliminary ruling under Article 267 TFEU, because the preliminary ruling itself is addressed to the national court or tribunal that referred the question. However, these rulings of invalidity have a practical *erga omnes* effect because the CJEU has stated that other national courts or tribunals are entirely justified in referring to these preliminary rulings declaring invalidity, even when these rulings are not addressed to them.[112]

The question of when the nullity takes place is the same in the different procedures. According to the general principles of EU law, this nullity is retroactive – *ex tunc* (as opposed to prospective – *ex nunc*).[113] The annularity takes effect from the date on which the act entered into force.[114] This retroactivity can cause hardship, and thus, the CJEU has the option, provided for in Article 264 TFEU, to state what effects an annulment shall have. This power arises out of necessity and has an important element of legal certainty, among others.[115] The CJEU has also held that the principles laid down in Articles 264 and 266 TFEU are applicable in cases under Article 267 TFEU.[116] In this regard, it is important to note that acts of the EU institutions are in principle presumed to be lawful and produce legal effects until such time as they are withdrawn, annulled, or declared invalid.[117]

In the context of State aid decisions, in the *Société Régie Networks* case[118], the ECJ applied Article 264 TFEU by analogy to mitigate the significant

[111] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 408.

[112] Case 66/80, *International Chemical Corporation*, ECLI:EU:C:1981:102, paras 13–15; Case 112/83, *Produits de Maïs v Administration des Douanes et Droits Indirects*, ECLI:EU:C:1985:86, para 16.

[113] **As for Article 263 TFEU**: Joined Cases T-481/93 and T-484/93, *Exporteurs in Levende Varkens and Others v Commission*, ECLI:EU:T:1995:209, para 46; Case T-171/99, *Corus UK v Commission*, ECLI:EU:T:2001:249, para 50; **As for Article 267 TFEU**: Case C-228/92, *Roquette Frères*, ECLI:EU:C:1994:168, para 17.

[114] Joined Cases 97/86, 99/86, 193/86 and 215/86, *Asteris and Others v Commission*, ECLI:EU:C:1988:199, para 30.

[115] Case C-41/95, *Council v Parliament*, ECLI:EU:C:1995:431, paras 43–45; Case 300/86, *Van Landschoot*, ECLI:EU:C:1988:342, para 24.

[116] **As for Article 264 TFEU**: Case 4/79, *Providence Agricole De la Champagne v ONIC*, ECLI:EU:C:1980:232, paras 44–45; Joined Cases C-38/90 and C-151/90, *Lomas and Others*, ECLI:EU:C:1992:116, paras 23–24; Case 41/84, *Pinna v Caisse d'Allocations Familiales de la Savoie*, ECLI:EU:C:1986:1, para 26; Case 112/83, *Produits de Maïs v Administration des Douanes et Droits Indirects*, ECLI:EU:C:1985:86, paras 17–18; **As for Article 266 TFEU**: Joined Cases 117/76 and 16/77, *Ruckdeschel and Hansa-Lagerbaus Ströh*, ECLI:EU:C:1977:160, para 13; Joined Cases 124/76 and 20/77, *Moulins et Huileries de Pont-à-Mousson and Providence Agricole de la Champagne*, ECLI:EU:C:1977:161, paras 27–29.

[117] Case C-123/18 P, *HTTS v Council*, ECLI:EU:C:2019:694, para 100.

[118] Case C-333/07, *Société Régie Networks*, ECLI:EU:C:2008:764.

hardship that would have otherwise ensued. The State aid measure in question had been operational for five years before the Commission's authorization was challenged through a preliminary ruling procedure. This procedure resulted in a declaration of invalidity of the Commission decision. Although a declaration of invalidity generally carries a retroactive (*ex tunc*) effect, both the Commission and the Member State requested that the ECJ maintain the legal effects of the invalid decision. The Court upheld the request but restricted the preservation of effects to a period of two months. This temporal limitation was designed to provide the Commission with sufficient time to adopt a new decision regarding the measure. The ECJ explained its decision by citing the duration of the aid's implementation, the high number of beneficiaries, and the fact that the aid had been duly notified to the Commission and remained unchallenged under Article 263 TFEU.[119]

Finally, according to Lenaerts, there is a distinction between these two procedures. The action for annulment constitutes a direct attack on an EU act, and the annulment means that the contested act never existed in the EU legal order. The preliminary ruling on validity instead results in the contested act being inapplicable in the EU legal order.[120]

[119] Case C-333/07, *Société Régie Networks*, ECLI:EU:C:2008:764, paras 117–128.
[120] Koen Lenaerts and others, *EU Procedural Law* (2nd edn, Oxford University Press 2023) 468.

# 3 Procedural Framework of EU State Aid Law

## 3.1 Article 107 TFEU

While the primary purpose of this thesis is to examine Article 108 TFEU, it is necessary to briefly address key aspects of Article 107 TFEU. These aspects include when a measure constitutes State aid and when it is compatible with the internal market.

### 3.1.1 When a measure constitutes State aid

In order for a measure by a Member State to constitute State aid under EU law, four cumulative criteria must be met according to Article 107(1) TFEU. These are: (1) there is an intervention by the State or through State resources which can take a variety of forms, (2) the intervention gives the recipient an advantage on a selective basis, (3) as a result of the intervention, competition has been or may be distorted, and (4) the intervention is likely to affect trade between Member States.

### 3.1.2 When State aid is compatible with the internal market

If a measure constitutes State aid within the meaning of Article 107(1) TFEU, it may nonetheless be declared compatible with the internal market pursuant to the derogations under Articles 107(2) and 107(3) TFEU. These provisions establish three main categories under which such State aid may be permitted.

The first category is set out in Article 107(2) TFEU. The Commission lacks discretion as to the compatibility of these categories of aid with the internal market. However, it falls within the Commission's power of assessment to verify that the conditions for the compatibility sought are fulfilled. Once it is established that the aid falls within the scope of one of these provisions, the Commission cannot withhold its authorisation and must declare it compatible with the internal market.[121]

The second category is set out in Article 107(3)(a–d) TFEU. These provisions, in contrast to Article 107(2) TFEU, allow the Commission to exercise its discretion and to take into account all the circumstances and the effect of the State aid on the internal market.[122] The Commission has the power to exempt particular types of State aid from the general prohibition in Article

[121] Case 730/79, *Philip Morris v Commission*, ECLI:EU:C:1980:209, para 17; Case T-268/06, *Olympiaki Aeroporia Ypiresies v Commission*, ECLI:EU:T:2008:222, para 51.

[122] Conor Quigley, *European State Aid Law and Policy* (4th edn, Hart Publishing 2022) 4.

107(1) TFEU, but it is under no obligation to do so.[123] This means that the Commission enjoys wide discretion in its application of Article 107(3) TFEU.[124] The Commission is nonetheless limited by the guidelines and rules of conduct it adopts, as these frameworks constitute a self-imposed limitation in respect of equal treatment.[125]

This discretion involves an assessment of the economic and social aspects of a measure within the Union.[126] According to Bacon, even though the relevant factors and specific provisions of Article 107(3) TFEU differ in each case, the Commission has to balance the positive impact of a measure against its potential negative effects when assessing its compatibility. The positive impact is the achievement of an objective of common interest, and the potential negative effects are the distortions of trade and competition. Bacon further elaborates that Commission authorization is centered on a proportionality assessment that weighs the positive impact of the measure against its potential negative effects. This means that the measure must be appropriately targeted, and the potential negative effects have to be limited to what is strictly necessary for pursuing the objective.[127]

The third category is set out in Article 107(3)(e) TFEU. This provision enables the Council, on a proposal from the Commission, to extend the range of State aid that may be compatible with the internal market, in addition to the categories specified in Article 107(3)(a–d) TFEU.[128] The purpose of this provision is to enable the authorization of State aid that falls outside the scope of Article 107(3)(a–d) TFEU.[129]

## 3.2 Pre-notification Contacts

Before a Member State notifies its proposed measure to the Commission pursuant to Article 108 TFEU, it has the opportunity to discuss the measure in question with the Commission. These informal contacts are referred to as *pre-notification contacts*. This procedure is set out in the Commission's Code of Best Practices for the conduct of State aid control procedures.[130] The Code of Best Practices provides guidelines to Member States, aid beneficiaries, and

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[123] Case C-409/00, *Spain v Commission*, ECLI:EU:C:2003:92, para 94.

[124] Case C-225/91, *Matra v Commission*, ECLI:EU:C:1993:239, para 24.

[125] Case C-431/14 P, *Greece v Commission*, ECLI:EU:C:2016:145, para 69; Case C-817/18 P, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others v Commission*, ECLI:EU:C:2020:637, para 100.

[126] Case C-301/87, *France v Commission*, ECLI:EU:C:1990:67, para 49.

[127] Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) 100.

[128] Case T-266/94, *Skibsværftsforeningen and Others v Commission*, ECLI:EU:T:1996:153, para 93.

[129] Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) 120.

[130] Commission, 'Code of Best Practices for the conduct of State aid control procedures' [2025] OJ C/2810.

other stakeholders on how the procedure works. The aim is to make the procedure more transparent, simple, clear, predictable, and timely.[131]

The Commission states that pre-notification contacts lead to better and more complete notifications from Member States when submitting the formal notification. Issues regarding legal and economic aspects can be discussed in an informal and confidential manner in order to address the changes to the proposed measure that are needed for the Commission to approve the measure.[132] The Commission recommends that Member States engage in pre-notification contacts, especially when the State aid has major technical, financial, and project-related implications. During this process, the Commission recommends that Member States invite beneficiaries and other stakeholders; however, this remains at the discretion of the Member State.[133]

At the end of the pre-notification phase, the Commission aims to provide a preliminary assessment of the proposed aid. In complex cases, the Commission may refrain from providing this assessment.[134] This preliminary assessment is non-binding, and it does not affect the subsequent evaluation of the case. Finally, the Code of Best Practices does not confer any new rights beyond those already established under the EU State aid framework.[135]

## 3.3 Article 108 TFEU and Regulation (EU) 2015/1589

According to Bacon, the EU system for the enforcement of State aid law is set out in Article 108 TFEU.[136] The CJEU has stated that the procedure laid down in Article 108 TFEU is specifically adapted to the special problems created by State aid with regard to competition in the internal market.[137] Bacon further emphasizes the importance of the Procedural Regulation[138] and outlines that this regulation is a codification of prior case law and practices.[139]

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[131] Commission, 'Code of Best Practices for the conduct of State aid control procedures', para 2.

[132] Commission, 'Code of Best Practices for the conduct of State aid control procedures', paras 9–10 and 20.

[133] Commission, 'Code of Best Practices for the conduct of State aid control procedures', para 16.

[134] Commission, 'Code of Best Practices for the conduct of State aid control procedures', paras 18–19.

[135] Commission, 'Code of Best Practices for the conduct of State aid control procedures', paras 7 and 20.

[136] Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) 440.

[137] Case 290/83, *Commission v France*, ECLI:EU:C:1985:37, para 17.

[138] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L248/9.

[139] Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) 441.

The provisions in the Procedural Regulation are deemed to supersede earlier conflicting case law.[140]

### 3.3.1 The notification procedure and the classification of commission decisions

According to Article 108(1) TFEU, the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. With regards to new State aid, Article 108(3) TFEU sets out that the Commission shall be informed of any plans by the Member States to grant or alter State aid.

Upon receiving a notification from a Member State, the Commission employs three distinct procedural routes for managing the process: the simplified procedure, the normal preliminary review procedure, and the formal investigation procedure.[141]

***The simplified procedure***

The simplified procedure is a fast-track procedure for the approval of notified aid. In order to qualify for this procedure, the proposed aid has to fall within the categories listed in the Notice from the Commission on a simplified procedure for treatment of certain types of State aid.[142] If all the conditions set out in the Notice are met, the Commission will decide that the notified measure either, ***does not constitute aid*** or ***not to raise objections***.[143] Should the requirements established in the Notice fail to be satisfied, the Commission will instead apply the normal preliminary review procedure.[144]

***The normal preliminary review procedure***

The Commission, during the normal preliminary review procedure, must, pursuant to Article 4(1) of the Procedural Regulation, adopt one of the decisions set out in Article 4(2–4) of that Regulation. Following this examination, the Commission may find that the notified measure (1) ***does not constitute State aid***, (2) that the measure is compatible with the internal market under Article

[140] Case T-351/02, *Deutsche Bahn v Commission*, ECLI:EU:T:2006:104, para 53.

[141] Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) 442.

[142] Commission, Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, [2009] OJ C 136/3, para 5.

[143] Commission, Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, para 2.

[144] Commission, Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, para 3.

107(1) TFEU, this is called ***decision not to raise objections***, or (3) to decide ***to initiate the formal investigation procedure***.[145]

This preliminary examination shall be completed within two months after the Commission has received a complete notification from the Member State. A notification is considered complete when the Commission does not request any further information regarding the notification.[146]

***The formal investigation procedure***

It is the responsibility of the Commission to decide, based on factual and legal circumstances, whether the aid in question requires the initiation of the procedure provided in Article 108(2) TFEU.[147] This requirement is triggered if the Commission finds the proposed measure is incompatible with the internal market, with regard to Article 107, or if doubts are raised about its compatibility.[148] The Commission enjoys a margin of discretion in identifying and evaluating the particular measure to determine whether it poses serious difficulties in the assessment of its compatibility with the internal market.[149]

The decision to initiate the formal investigation procedure shall include a summary of the relevant issues regarding the facts and the law. It shall also include a preliminary assessment by the Commission regarding the character of the measure and any doubts as to its compatibility with the internal market. Further, the decision shall call upon Member States and other parties concerned to submit their comments within a prescribed period of time.[150] The purpose of initiating the formal investigation is to enable the Commission to gather all the information it needs in order to assess the proposed measure. Additionally, the interests of the concerned parties are better considered through a formal investigation due to their right to submit comments on the measure.[151]

The formal investigation procedure may be concluded in one of five ways. First, the procedure is terminated if the Member State withdraws its notification.[152] Second, if the Commission considers that the proposed measure does not constitute State aid, it may issue a ***no-aid*** decision. This assessment by the Commission may include any amendments made by the Member State.[153] Third, a ***positive decision*** is reached if the Commission finds the measure

[145] Regulation (EU) 2015/1589, Article 4(2–4).
[146] Regulation (EU) 2015/1589, Article 4(5).
[147] Case C-198/91, *Cook v Commission*, ECLI:EU:C:1993:197, para 30.
[148] Regulation (EU) 2015/1589, Article 4(4).
[149] Case T-388/03, *Deutsche Post and DHL International v Commission*, ECLI:EU:T:2009:30, para 87.
[150] Regulation (EU) 2015/1589, Article 6(1).
[151] Regulation (EU) 2015/1589, Recital 8, and Article 108(2) TFEU.
[152] Regulation (EU) 2015/1589, Article 10.
[153] Regulation (EU) 2015/1589, Article 9(2).

compatible with the internal market; this must specify the applicable TFEU exception and account for any amendments.[154] Fourth, the Commission may issue a ***conditional decision*** approving the measure while attaching specific conditions and obligations to ensure its compatibility and compliance.[155] Fifth, if the Commission finds the proposed measure incompatible with the internal market, it shall issue a ***negative decision*** stipulating that the proposed measure shall not be implemented.[156]

### 3.3.2 The Standstill obligation

The Standstill obligation, also known as the Standstill clause, is stated in Article 108(3) TFEU and Article 3 of the Procedural Regulation. The notion of the Standstill obligation is that the Member State is prohibited from implementing State aid until the Commission has taken a decision authorizing it.[157] This prohibition is applicable during the entire notification procedure, both during the preliminary examination and the formal investigation. Thus, the Member State has an obligation not to put the proposed measure into effect until the Commission has finalized a final decision.[158]

The standstill obligation applies regardless of whether the Member State considers the measure to be compatible with the internal market. The fact that the State aid would be considered lawful upon notification and subsequent approval by the Commission does not remedy the initial wrongdoing of failing to notify and await the final decision.[159]

The purpose of the Standstill obligation is to safeguard the procedural framework of EU State aid law regarding new State aid. This means that a system of State aid cannot become operational before the Commission has approved it.[160] This purpose is further divided into two parts. According to Jaeger, the first is to protect individuals from the consequences of unlawful State aid. The second is to safeguard the effectiveness of the notification obligation. These two purposes are closely intertwined; according to Jaeger, the scope of individual rights in national courts should be interpreted in a manner that maximizes the *effet utile* of the Standstill obligation.[161]

The consequences of by not following this obligation to notify and to await the final decision of the Commission are that the aid will be considered

[154] Regulation (EU) 2015/1589, Article 9(3).
[155] Regulation (EU) 2015/1589, Article 9(4).
[156] Regulation (EU) 2015/1589, Article 9(5).
[157] Regulation (EU) 2015/1589, Article 3.
[158] Article 108(3) TFEU and Article 3 Regulation 2015/1589; C-332/98, *France v Commission*, ECLI:EU:C:2000:338, paras 31–32.
[159] Case C-332/98, *France v Commission*, ECLI:EU:C:2000:338, paras 31–32.
[160] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 36.
[161] Thomas Jaeger, 'The CELF-Judgement: A Precarious Conception of the Standstill Obligation' (2008) 7(2) European State Aid Law Quarterly 279, 282.

unlawful.[162] The consequences of this unlawfulness cannot be cured through a subsequent positive decision by the Commission. The decision by the Commission does not have a retrospective regularisation effect.[163]

### 3.3.3 Recovery of aid

The consequence of a Member State having implemented unlawful State aid is the recovery of such aid. This recovery creates an obligation on the Member State to recover the aid from the beneficiaries. The recovery of State aid shall, in principle, also include appropriate interest. It is this interest that constitutes the core hardship and the main reason for resisting the recovery of unlawful State aid.

The obligation to recover unlawful State aid may arise from three main EU law sources. The first one is pursuant to a recovery decision by the Commission, which is addressed to the Member State concerned. This decision is binding on the Member State in accordance with Article 288(4) TFEU.[164] The second one is pursuant to Article 4(3) TEU, where the Member State is obliged to facilitate the achievement of the EU's tasks, which include the achievement of a proper internal market and thus ensuring the recovery of unlawful State aid.[165] A notification or a decision from the Commission is not needed for this obligation.[166] The third one is pursuant to a national court order based on a breach of the Standstill obligation in Article 108(3) TFEU. This provision has direct effect, and it is immediately enforceable in national courts.[167]

The aim of these recovery measures is to restore the *status quo ante*[168] and thus to eliminate the competitive advantage the beneficiary had. This is done by repaying the aid received, with appropriate interest, in order to eliminate the competitive advantage the beneficiary over its competitors.[169] This recovery must result, in principal, in the actual recovery of the sums owed.[170] It is not possible for the beneficiary to seek a reduction of the sums owed through the establishment of an alternative scenario that would have arisen in the

[162] Regulation (EU) 2015/1589, Article 1(3)(f); Case C-354/90, *FNCE*, ECLI:EU:C:1991:440, para 16.

[163] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 40; Case C-354/90, *FNCE*, ECLI:EU:C:1991:440, para 16.

[164] Regulation (EU) 2015/1589, Article 16 and 31.

[165] Case 96/81, *Commission v Netherlands*, ECLI:EU:C:1982:192, para 7; Case C-382/99, *Netherlands v Commission*, ECLI:EU:C:2002:363, para 91; Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) 478.

[166] Case C-349/17, *Eesti Pagar*, ECLI:EU:C:2019:172, paras 89–92.

[167] C-354/90, *FNCE*, ECLI:EU:C:1991:440, para 11.

[168] Refers to the legal or factual state of affairs preceding a specific event.

[169] Case C-142/87, *Belgium v Commission*, ECLI:EU:C:1990:125, para 66; Case C-277/00, *Germany v Commission*, ECLI:EU:C:2004:238, paras 74–76; Joined Cases T-111/01 and T-133/01, *Saxonia Edelmetalle v Commission*, ECLI:EU:T:2005:166, paras 113–114.

[170] Case C-232/05, *Commission v France*, ECLI:EU:C:2006:651, para 42.

absence of the measure.[171] Attempting to reconstruct past events differently on the basis of hypothetical elements is unnecessary and will not affect the total sums owned.[172] The recovery thus concerns the restitution of the aid which the beneficiary received, with appropriate interest, and not the restitution of any economic benefit the beneficiary may have derived as a result from the measure.[173]

The authorities of Member States are free to choose the means of fulfilling the recovery obligation. However, they are limited by the requirement that the measure does not adversely affect the scope and effectiveness of EU law.[174]

The Commission is not permitted to order the recovery of a measure if doing so would be contrary to a general principle of EU law. This provision should only be seen as an exception that only should be used exceptionally.[175] This limitation also extends to national authorities adopting recovery measures.[176]

### 3.3.4 Interest payment on recovery

The CJEU has held that the recovery of unlawful State aid shall include interest. The purpose of this requirement is to offset the distortion of competition and restore the *status quo ante*. The Court provides two primary reasons for this requirement. The first relates to the beneficiary's competitors. They are exposed to an unfair, market-distorting measure and, even if the aid is later deemed compatible with the internal market, it's premature implementation means competitors face the disadvantages associated with the aid earlier than allowed. The second reason concerns the beneficiary: if interest is not included in the recovery, the beneficiary effectively gains an interest-free loan, allowing for a cash-flow increase that may result in a better market position. This requirement thus serves to re-establish that prior competitive balance.[177]

The interest pursuant to a recovery decision by the Commission shall, according to Article 16(2) of the Procedural Regulation, be set at an appropriate rate fixed by the Commission. The interest rate shall apply from the date on which

[171] Case C-148/04, *Unicredito Italiano*, ECLI:EU:C:2005:774, para 114.

[172] Case T-468/08, *Tisza Erőmű v Commission*, ECLI:EU:T:2014:235, para 296.

[173] Joined Cases C-164/15 P and C-165/15 P, *Commission v Aer Lingus and Ryanair*, ECLI:EU:C:2016:990, paras 92–93 and 100.

[174] Case C-527/12, *Commission v Germany*, ECLI:EU:C:2014:2193, para 40.

[175] Regulation (EU) 2015/1589, Article 16(1); Cases C-622/16P to C-624/16P, *Scuola Elementare Maria Montessori srl v Commission*, ECLI:EU:C:2018:873, para 98.

[176] Case C-89/14, *A2A SpA v Agenzia delle Entrate*, ECLI:EU:C:2015:537, para 35.

[177] Case C-348/93, *Commission v Italy*, ECLI:EU:C:1995:95, para 27; Case C-480/98, *Spain v Commission*, ECLI:EU:C:2000:559, para 35; Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 50–54.

the aid was received by the beneficiary and at its disposal until the date of its actual recovery.[178]

The method for establishing the applicable interest rate for the recovery of the aid in question is regulated mainly in Regulation (EC) No 794/2004[179]. In order of priority, the interest rate decided by the Commission in its recovery decision shall be applicable.[180] When this is not provided for, the interest rate shall be an annual percentage rate based on the one-year money market rate with an additional 100 basis points.[181] This reference rate is published by the Commission in the *Official Journal of the European Union*.[182] The Commission's method of determining the applicable rate has been approved by the GC as representing a valid indicator of the market rates. These rates thus represent the average level of interest rates in force in each of the Member States. The GC notes that these market rates apply to industrial investments, but for reasons of legal certainty and equality of treatment, the Commission may consider as a general rule that it is legitimate to apply these rates.[183] These provisions are implemented as a regulations and thus, according to Article 288(2) TFEU, they are binding and directly applicable in all Member States. Thus, these provisions shall have precedence over conflicting national provisions.[184]

In situations where a national authority is bound under Article 108(3) TFEU to order the recovery in respect of the period of unlawfulness, the question of interest is different from that which arises pursuant to a recovery decision by the Commission.

In cases where a national authority is required under Article 108(3) TFEU to recovery for the period of unlawfulness, the matter of interest is distinct from the situation involving a recovery decision issued by the Commission. The scope of Article 16(2) of Regulation (EC) No 794/2004 does not cover situations where a national authority orders the recovery of unlawful State aid pursuant to Article 108(3) TFEU. This has been confirmed by the ECJ, which clarified that these provisions do not constitute EU legislation on this subject matter and that application by analogy is not permissible.[185] Despite this, the national authority is still required to order the recovery and to decide upon the interest rate for the period of unlawfulness. The ECJ has stated, in this context, that in the absence of EU legislation on this subject, the national

[178] Regulation (EU) 2015/1589, Article 16(2).

[179] Commission Regulation (EC) 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2004] OJ L140/1.

[180] Regulation (EC) 794/2004, Article 9(1).

[181] Commission Regulation (EC) 794/2004, Article 9(1–2).

[182] Commission Regulation (EC) 794/2004, Article 10.

[183] Case T-308/00, *Salzgitter v Commission*, ECLI:EU:T:2013:30, paras 141–142.

[184] Conor Quigley, European State Aid Law and Policy (4th edn, Hart Publishing 2022) 726.

[185] Case C-349/17, *Eesti Pagar*, ECLI:EU:C:2019:172, paras 89–92.

authority must order the recovery of the unlawful State aid in accordance with applicable national law.[186] Finally, the ECJ has also stated that, in order to comply with the principles of equivalence and effectiveness, the applicable national law must provide for interest for the whole period of unlawfulness and at a rate equivalent to the market borrowing costs the beneficiary would have incurred for the aid amount during that same period.[187]

[186] Case C-349/17, *Eesti Pagar*, ECLI:EU:C:2019:172, para 135.
[187] Case C-349/17, *Eesti Pagar*, ECLI:EU:C:2019:172, paras 137–138, 141.

# 4 The Legal Effect Regarding the Standstill Obligation

## 4.1 Diverging Views in the Legal Literature

In the legal literature, different views exist on the legal matter regarding what happens in a situation where the Union judiciary annuls an approval decision by the Commission concerning a State aid measure which has already been implemented. This has been highlighted by Raitio, who deems this question to be open for interpretation and also of great economic importance.[188]

According to Kreuschitz, this question must be answered by dividing the Commission's decision into two aspects. He argues that the initial positive decision by the Commission concerns both the procedural aspect (lawfulness) and the substantive one (compatibility). When the Union judiciary annuls the decision, this annulment only has an effect on the substantive part of the decision by the Commission. This means that the lawfulness of the decision still stands, because the Member State still followed the correct procedure set out in Article 108 TFEU. Additionally, Kreuschitz points out that the legal issue of recovery is still at hand and that the implemented measure is outside the reach of national courts. He therefore suggests that the Commission to order a provisional recovery of aid pursuant to Article 13 of the Procedural Regulation in order to avoid a loophole in the system.[189]

A similar view is supported by Grespan, Pelin, and Rossi. They argue that the effect of the Standstill obligation, when the initial positive decision is annulled by the Union Judiciary, comes into force *ex nunc* rather than *ex tunc*, which is the general rule. As to the calculation of interest, due to the *ex nunc* effect, it should be calculated from the date of the judgment.[190]

This view regarding the question of whether the annulment takes effect *ex tunc* or *ex nunc* is supported by Slot. He argues, on the basis of a comparative assessment of a similar rule in Article 101 TFEU, Article 7(1) and 10(5) of

[188] Juha Raitio, 'Observations about the Notification Procedure for State Aid, Notification for Legal Certainty, and the Standstill Clause in Article 108(3) TFEU' [2019] (3) *Europarättslig tidskrift* 461. 470.

[189] Viktor Kreuschitz, in Herwig Hofmann, Claire Micheau and Bucura C Mihaescu-Evans (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 457–458.

[190] Davide Grespan, April Pelin and Luca Rossi, in Nicola Pesaresi and others (eds), *EU Competition Law* (Edward Elgar Publishing 2016) 1417–1418.

the Merger Control Regulation,[191] that the annulment should take effect *ex nunc*.[192]

Another view is held by Quigley, who introduces an important distinction. He states that the phrase "final decision" by the Commission, in Article 108(3) TFEU, shall have the meaning of a definitive ruling. This means that the time limit stated in Article 263 TFEU shall be expired, or that the procedure set out in Article 263 TFEU has finalized in a definitive ruling. Thus, the legal effect of the annulment takes effect *ex tunc*, including for the calculation of interest.[193] This view is also supported by Bacon, who specifically states that any implementation pursuant to the initial decision by the Commission, which is subsequently annulled, is deemed to have been unlawful.[194]

## 4.2 Case Law Regarding the Standstill Obligation

In the first *CELF and Ministre de la Culture et de la Communication* case[195] the notion of the Standstill obligation with regard to judicial review was considered by the ECJ. The case concerned an agreement between a Member State and a beneficiary called CELF. They had an agreement that CELF would supply book orders to overseas territories. Some of these book orders were unprofitable, and in exchange for fulfilling these orders, CELF received operating subsidies from the Member State. A competitor of CELF, called SIDE, asked the Commission if it had been notified under Article 108 TFEU of this aid granted to CELF. The Commission confirmed the existence of the aid and that it had not been notified. The Commission later decided that the aid to CELF constituted compatible aid under Article 107 TFEU. SIDE brought an action for annulment against this decision under Article 263 TFEU, and the GC upheld the action. The Commission then opened a formal investigation procedure and later adopted a positive decision declaring the aid compatible under Article 107 TFEU. SIDE brought another action for annulment against this decision under Article 263 TFEU, and the GC upheld the action. The Commission later adopted a positive decision once again and declared the aid compatible. SIDE brought another action for annulment against

[191] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1.

[192] Piet Jan Slot, in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (4th edn, Sweet & Maxwell 2012) 974–975.

[193] Conor Quigley, *European State Aid Law and Policy* (4th edn, Hart Publishing 2022) 714–715.

[194] Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) 535.

[195] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79.

this decision under Article 263 TFEU, and the GC once again upheld the action.[196]

During these proceedings at the GC, national proceedings were brought in the national courts. SIDE requested that the aid scheme and the aid granted by the Member State be stopped and repaid. The national case resulted in a reference for a preliminary ruling under Article 267 TFEU by the national court. This reference concerned the Standstill obligation in Article 108(3) TFEU, specifically asking: must a national court order the recovery of State aid if it was implemented without due process of Article 108 TFEU, and if the Commission has subsequently declared the aid to be compatible with the internal market after the implementation of the aid.[197] The ECJ stated that the national court must only order the payment of interest for the period of unlawfulness, and not the entire sum aid the beneficiary received.[198]

The reference to the ECJ also included a question on how this interests-payment should be calculated with regard to the positive decisions by the Commission. Should the period between the positive decision by the Commission and when the GC annuls the decision be included in the calculation of interest? Essentially asking if the decision by the Commission, which later was annulled, has any effect on the calculation of interest.[199] The reason to why this particular question is relevant to the purpose of the thesis is that the question of interest payment is directly linked to the breach of the Standstill obligation. If the positive final decision by the Commission regarding the already implemented State aid does not end the unlawful period of the implemented aid when that decision is annulled by the GC, then the positive final decision by the Commission when that decision has been annulled by the GC, does not relieve the Member State of the Standstill obligation.

The ECJ answered this question through an analysis of the legal effects of the decision by the Commission and the annulments by the GC. First, the ECJ stated that decisions by the EU institutions are presumed to be lawful and they produce legal effects until otherwise.[200] Secondly, the ECJ stated that the Union Court's decision of annulment leads to the retroactively disappearance of

[196] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 2–21; Case T-49/93, *SIDE v Commission*, ECLI:EU:T:1995:166; Case T-155/98, *SIDE v Commission*, ECLI:EU:T:2002:53; Case T-348/04, *SIDE v Commission*, ECLI:EU:T:2008:109.

[197] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 22–31.

[198] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 55.

[199] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 56.

[200] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 60.

the contested act.[201] The ECJ then explained how the presumption of lawful decisions and the retroactive effect of an annulment should be interpreted in the context of the State aid recovery. The interpretation by the ECJ is that the rule of retroactive effect of an annulment takes precedence over the presumption of lawful decisions. This means that the positive decision by the Commission does not have any legal effects with regard to the interest calculation if the decision subsequently gets annulled by the Union Courts.[202] In connection with the purpose of the thesis, this implies that Standstill obligation is reinstated when the positive decision by the Commission is subsequently annulled by the GC. Because the Member State has already implemented the aid, it is therefore breaching the Standstill obligation, even though at the time of implementation the Member State was relieved of the Standstill obligation. Consequently, the legal effect of the annulment takes effect *ex tunc*.

## 4.3 Conclusions for Further Examination in the Next Part

According to the previous subsection, the interpretation of the Standstill obligation in Article 108(3) TFEU and Article 3 of the Procedural Regulation is thus that the final decision by the Commission must become definitive. Meaning that the time limit for bringing an action for annulment under Article 263 TFEU has elapsed. This interpretation of the Standstill obligation is supported by the Commission in its decisions on State aid matters.[203]

Regarding the different interpretation methods deployed by the CJEU,[204] the above interpretation of the Standstill obligation is an application of the *teleological interpretation method*, as the Court focuses on the *effet utile* of the Standstill obligation and the protection of the internal market. The *grammatical interpretation method* would suggest that the Standstill obligation ceases once the Commission issues a final decision. The discrepancy between these two interpretation methods raises concerns regarding legal certainty and legitimate expectations. This issue will be used as a reference point when assessing the part 2 of this thesis.

[201] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 61.

[202] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 62–64 & 69.

[203] E.g. cases SA.57543 and SA.58342 Scandinavian Airlines System (SAS) [2024] OJ L/2024/2549, recital (131).

[204] See subsection 1.3.2.

# Part 2

# 5 The Principle of Legal Certainty and the Principle of the Protection of Legitimate Expectations

## 5.1 The Origin of the General Principles of EU Law

The origin of the general principles of EU law stems from the inability of any legal system to legislate, or to provide an answer, to every question which comes before the courts. The courts are bound to render a judgment, otherwise they violate the principle of *déni de justice*. Thus, they create rules of law to decide the issues before them. These rules of law cannot be too apparent, as the Court may be accused of going beyond the role and function of the judiciary and into the role and function of the legislature.[205]

The CJEU noted early on that the written legal instruments of EU Law were unable to give an answer to all the legal issues which arose before the judiciary.[206] The CJEU in particular was more likely to be affected due to it being a new legal order which lacked the accumulated judicial experience and case law compared to national legal systems. Further, the EU legal order is a new one of its kind. Tridimas emphasises that the EU legal order represents a new development in the law of international organizations. The provisions of the Treaties are also numerous and use vague terms and expressions which are not defined. Thus, according to Tridimas, it is logical for the CJEU to fill these gaps.[207]

The CJEU has thus utilized general principles of law to fill the void in the written legal instruments of EU law. The idea is that if a ruling can be derived from a principle of sufficient generality as to common assent, a firm legal foundation for the judgment is provided.[208] This line of reasoning regarding the use of general principles of law in order to establish a legal basis, is not uncommon. Article 38(3) of the Statute of the Permanent Court of International Justice and Article 38(1) of the Statute of the International Court of Justice both legitimize the use of general principles of law. It was expected that the CJEU would refer to these rules of public international law to legitimize the use of general principles of law in EU law. The CJEU did not, however refer to these rules. The CJEU has chosen to refer to Article 19(1) TEU

[205] Trevor C Hartley, *The Foundations of European Community Law* (3rd edn, Oxford University Press 1994) 137.

[206] Jörgen Hettne and Ida Otken Eriksson, *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts Juridik 2011) 64.

[207] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 17–18.

[208] Trevor C Hartley, *The Foundations of European Community Law* (3rd edn, Oxford University Press 1994) 137.

when developing general principles of EU law. It has also referred to Article 340(2) TFEU.[209]

## 5.2 The Purpose and Early Development of Legal Certainty and Legitimate Expectations as General Principles of EU Law

The purpose of the underlying principles of legal certainty and legitimate expectations appears to be primarily economic. Barrett problematizes a key aspect of this economic purpose, noting first that these principles are mainly deployed in highly regulated economic sectors. He observes that the business environment is subject to constantly changing factors, such as price, supply, and demand, that impact operators' profits. He then questions why operators cannot simply treat regulatory risk as another inherent risk to be tolerated. According to Barrett, the reason is that legal certainty within the regulatory framework is essential to economic actors. Without a stable basis for forward planning, these actors are deterred from participating in the market. Consequently, excessive regulatory instability eventually reaches a tipping point that undermines market participation, which is detrimental to society as a whole. Despite this, there is still a need for a degree of discretion for regulatory bodies to effectively respond to market changes.[210] Furthermore, according to Sharpston, if regulatory authorities are perceived as arbitrary or inclined to implement abrupt and frequent changes to the regulatory framework, some businesses will inevitably "vote with their feet", relocating to other jurisdictions if necessary.[211] The principles of legal certainty and legitimate expectations are the point where the Union draws the line between these competing interests.[212]

In the *Algera* Case[213], the CJEU addressed an issue relating to the principle of legal certainty for the first time.[214] The background of the dispute involved a personnel decision that was revoked with retroactive effect, and concerned under what circumstances an administrative measure can be revoked retroactively. The comparative study by the CJEU concluded that all the Member States have laws that protect the individual rights which has been conferred on them through an administrative measure. The Member States also allow

[209] Jörgen Hettne and Ida Otken Eriksson, *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts Juridik 2011) 64–65.

[210] Gavin Barrett, 'Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law' (2001) 20 Yearbook of European Law 191, 203–204.

[211] Eleanor Sharpston, 'Legitimate expectations and economic reality' (1990) 15 European Law Review 103, 106.

[212] Gavin Barrett, 'Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law' (2001) 20 Yearbook of European Law 191, 204.

[213] Joined Cases 7/56 and 3/57 to 7/57, *Algera*, ECLI:EU:C:1957:7.

[214] Xavier Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?* (Europa Law Publishing 2006) 282.

for the revocability of illegal measures if they are revoked within a reasonable period of time. Consequently, the Court determined that these shared principles should likewise be integrated into EU law.[215]

The first instance where the CJEU made the first reference to the principle of legal certainty was the *SNUPAT* case[216]. The dispute concerned the retroactive withdrawal of illegal acts. The Court first acknowledged and referred to the principle of legal certainty. It then noted that the principle cannot be applied in an absolute manner and that its application must be combined with the principle of legality. The question of which of these principles should prevail is depends on the individual case in question. The Court balanced in this case, on the one hand, the interest of the beneficiaries in assuming, in good faith, that the decision stands and thus might arrange their affairs accordingly. On the other hand, the interest of the EU in ensuring the proper working of its scheme to ensure fair competition.[217]

The Court did not in these cases specify under what conditions administrative measures confer rights on the individual, nor when these rights are irrevocable (vested). The central issue was whether the meaning of this general principle of EU law should adopt the meaning of French law, which categorizes decisions as either declaratory or discretionary, or that of German, Dutch, and Nordic law, which places more emphasis on the specific circumstances of the individual case. In the *De Compte* case[218], the CJEU confirmed that the latter was the interpretation of EU law.[219]

## 5.3 Considerations Regarding the General Principles of EU Law, Legal Certainty and Legitimate Expectations

### 5.3.1 The vagueness and character of the general principles of EU law

General principles of EU law vary in their degree of abstraction. At times, these principles can be so abstract that they lack significance in practical legal application. Thus, they are often viewed as too vague to be written down or codified. However, such codification often entails a reorganization of these principles.[220] Some principles provide guidance to the Union administration

[215] Joined Cases 7/56 and 3/57 to 7/57, *Algera*, ECLI:EU:C:1957:7.

[216] Joined Cases 42/59 and 49/59, *SNUPAT v High Authority*, ECLI:EU:C:1961:5.

[217] Joined Cases 42/59 and 49/59, *SNUPAT v High Authority*, ECLI:EU:C:1961:5.

[218] Case C-90/95, *De Compte v Parliament*, ECLI:EU:C:1997:198.

[219] Jörgen Hettne and Ida Otken Eriksson, *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts Juridik 2011) 86–87.

[220] Jörgen Hettne and Ida Otken Eriksson, *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts Juridik 2011) 63.

when it encounters ambiguities, while others are constitutional in nature.[221] In one case, the ECJ applied a principle of EU law against the literal wording of the Treaties themselves. Previously, the Parliament lacked legal standing to bring an action for annulment. However, the CJEU granted the Parliament standing to protect its prerogatives, doing so to preserve the institutional balance within the Union.[222]

The character of a general principle of EU law, which has been derived from the Member States, may differ from the character it possesses within those Member States. The CJEU may extend, narrow, restate, or transform the scope of the principle. Tridimas illustrates the different characteristics between the general principles of EU law and those of the Member States by noting that general principles of EU law are the children of the Members States' national legal systems, but they are brought up by the CJEU.[223]

### 5.3.2 The different functions of the general principles in the EU legal order

According to Tridimas, the general principles of EU law perform three different functions. These are (1) to serve as an aid to interpretation, (2) to serve as grounds for review, and (3) to serve as rule of law, the breach of which may give rise to liability in damages.[224] Given the purpose of this thesis, and because Chapter 2 already covers the grounds for review, this subsection will only consider the first function of the general principles of EU law, namely its function as an aid to interpretation.

According to Tridimas, there is a general rule of interpretation which is derived from the principle of the hierarchy of norms. This rule dictates that the interpretation of secondary EU law should, as far as possible, be given to that interpretation that renders the provision consistent with the Treaties and the general principles of EU law.[225] This general rule of interpretation has been used by the CJEU in cases concerning the principle of legal certainty,[226] and the principle of the protection of legitimate expectations.[227]

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[221] Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 684–685.

[222] Case C-70/88, *Parliament v Council*, ECLI:EU:C:1990:217, paras 25–27.

[223] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 6.

[224] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 29.

[225] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 29; Joined Cases 201 and 202/85, *Klensch v Secrétaire d'État*, ECLI:EU:C:1986:439, para 21; Case C-314/89, *Siegfried Rauh*, ECLI:EU:C:1991:143, para 17.

[226] Case C-1/94, *Cavarzere Produzioni Industriali and others*, ECLI:EU:C:1995:266, para 30.

[227] Case C-314/89, *Siegfried Rauh*, ECLI:EU:C:1991:143, para 22.

This general rule of interpretation has its limits. Tridimas highlights that the general principles of EU law do not allow for an interpretation of secondary EU law that effectively amends or supplements the original provision. Consequently, the CJEU must declare such legislation invalid instead of introducing judicial amendments or supplements that would be necessary to ensure compliance with the general principles of EU law.[228] Distinguishing between an interpretation of secondary EU law that effectively amends or supplements a measure and one that merely interprets it in light of the general principles remains a significant challenge. Tridimas compares this difficulty to the duty of consistent interpretation as established in the *Marleasing* Case[229]. Both interpretive principles aim to ensure that the lower tier norms are interpreted in light of the superior norms.[230]

### 5.3.3 Legal certainty and its role as an umbrella for other principles

The principle of legal certainty is described as an umbrella principle, meaning that it in turn contains several other principles. These are the principle of the protection of legitimate expectations, the principle of vested/acquired rights, and the principle of non-retroactivity.[231] The scopes of the principle of vested/acquired rights and the principle of non-retroactivity, according to Groussot, are strongly connected to the principle of the protection of legitimate expectations.[232] Raitio argues that the categorization between the principle of legitimate expectations and the principle of vested/acquired rights is more formal than substantive in EU law. He cites the *C.A.M* case[233] as a source for this statement.[234] The CJEU in the *C.A.M* case did not specifically distinguish between the different assessments for the applicant's separate submissions regarding vested rights and legitimate expectations.[235] The principle of legitimate expectations has been said to be the logical consequence of the principle of legal certainty.[236]

[228] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 30; See also Case C-85/90, Opinion, *William Dowling*, ECLI:EU:C:1992:170, para 10.

[229] Case C-106/89, *Marleasing*, ECLI:EU:C:1990:395, paras 12–13.

[230] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 30.

[231] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 194; Van Meerbeeck, Jérémie. 'The principle of legal certainty in the case law of the European court of justice: from certainty to trust.' (2016) 41(2) European Law Review 275, 280.

[232] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 194.

[233] Case 100/74, *C.A.M. v Commission*, ECLI:EU:C:1975:152.

[234] Juha Raitio, *The Principle of Legal Certainty in EC Law* (Kluwer Academic 2003) 253.

[235] Case 100/74, *C.A.M. v Commission*, ECLI:EU:C:1975:152, paras 30–31.

[236] Van Meerbeeck, Jérémie. 'The principle of legal certainty in the case law of the European court of justice: from certainty to trust.' (2016) 41(2) European Law Review 275, 280.

When interpreting the principle of legal certainty in EU law, the CJEU interpreters the principle in relation to the objectives of the EU and its key legal principles. The special nature of EU law is thus of importance.[237] In an *Opinion*[238] pursuant to Article 218(11) TFEU, the ECJ stated the specific characteristics arising from the nature of EU law. These are; that EU law is characterized by stemming from an independent source of law – mainly the Treaties – and also its supremacy over national laws, and by the direct effect of a whole series of provisions in relation to the Member States.[239] Nonetheless, Raitio emphasises that the principle of legal certainty, which is a general principle of EU law, still cannot be defined accurately.[240]

The ECJ has held that the principle of legal certainty requires, in particular, that rules should be clear and precise, in order for individuals to be able to assess unequivocally their rights and obligations, and thus may take steps accordingly.[241] In order to meet these requirements, legislation must enable those concerned to know precisely the extent of their obligations, and they must be able to determine their rights and obligations.[242] Furthermore, the ECJ has stated that the principle of legal certainty must be observed all the more strictly in cases that entail financial consequences.[243]

[237] Juha Raitio, in Allan Rosas, Juha Raitio and Pekka Pohjankoski (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023) 65.

[238] Opinion, 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454.

[239] Opinion, 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, para 166.

[240] Juha Raitio, in Allan Rosas, Juha Raitio and Pekka Pohjankoski (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023) 65.

[241] Case C-308/06, *Intertanko and Others*, ECLI:EU:C:2008:312, para 69.

[242] Case C-504/19, *Banco de Portugal and Others*, ECLI:EU:C:2021:335, para 51.

[243] Case 326/85, *Zuckerfabrik Bedburg v Council and Commission*, ECLI:EU:C:1987:547, para 24; Case C-94/05, *Geraldo Cruz Vilaça*, ECLI:EU:C:2006:185, para 43; Case C-158/06, *Stichting ROM-projecten*, ECLI:EU:C:2007:370, para 26; Case C-504/19, *Banco de Portugal and Others*, ECLI:EU:C:2021:335, para 52.

# 6 Infringement of the Principles of Legal Certainty and the Protection of Legitimate Expectations

## 6.1 The Method of Assessment for the Infringement of the Principles of Legal Certainty and Protection of Legitimate Expectations

The CJEU does not always specify the principle of legal certainty and the principle of the protection of legitimate expectations as two distinct pleas in law.[244] Therefore, this thesis will consider the principle of legal certainty and the principle of the protection of legitimate expectations as a single and unified rule of law plea.

According to Tridimas, in order for a non-criminal measure of retroactivity to be permissible under EU law, it must satisfy strict conditions. These are, cumulative to each other, (a) the retroactive effect must be necessary to achieve the objectives of the measure, and (b) the legitimate expectations of those concerned must be respected. Tridimas emphasises that these two conditions cannot be separated and that they represent a conflict of interest. The CJEU, according to Tridimas, thus performs a balancing exercise in which it weighs, on the one hand, the interest of the public, which is the underlying purpose of the retroactive measure, and on the other hand, the requirement that the legitimate expectations of those affected are respected.[245]

According to Groussot, the application of the principle of the protection of legitimate expectations requires a three-step test.[246] This test is described as follows:

> First, the expectation must arise from a specific/precise assurance resulting either from legislation or a conduct. Secondly, the expectation must be worthy of protection or justified. In other words, the expectation must be legitimate. Thirdly, a balancing of interest must be undertaken. For instance, a matter of public interest may override the legitimate expectation.[247]

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[244] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 242; Joined Cases 212 to 217/80, *Amministrazione delle finanze dello Stato v Salumi*, ECLI:EU:C:1981:270, para 10; Case C-482/17, *Czech Republic v Parliament and Council*, ECLI:EU:C:2019:1035, paras 140–158.

[245] Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 254–256.

[246] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 204.

[247] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 204.

Groussot further elaborates that an expectation which is worthy of protection, or a justified expectation, is not absolute. He also compares this three-step test with the proportionality test. The latter consists of an assessment of the; suitability, necessity and proportionality.[248]

A similar assessment is provided by Galetta and Ziller. In order to rely on the principle of the protection of legitimate expectations, the CJEU applies a two-step examination. The first step is to assess whether or not legitimate expectations were created in the situation at hand. The assessment of step one also includes an assessment of whether or not the legitimate exceptions is worthy of protection. Galetta and Ziller use the term "*in good faith*".[249] The second step involves a balancing of interests. The reason, according to Galetta and Ziller, behind the need to balance these interests is that the principle of the protection of legitimate expectations is closely connected to other general principles of EU law. Thus, the balancing act takes into account other general principles of EU law in order to strike a balance between the public interest of lawful administration and individual fairness. This balancing act is done through the principle of proportionality, which employs the three-step examination of suitability, necessity and proportionality.[250]

The different assessments of how the principle of the protection of legitimate expectations should be applied, as proposed by the various authors, are very similar to each other. This can be attributed to the fact that these sub-requirements are largely intertwined and interdependent.[251] The choice of assessment method in this thesis is the one provided by Groussot. The reason is that this method of assessment is more clearly structured and more thorough than the others. Thus, in order to assess the principles of legal certainty and the protection of legitimate expectations as a plea in law, this thesis adopts the method of assessment provided by Groussot.

### 6.1.1 Step One: Is there an expectation arising from a conduct by the EU?

The first step is to assess whether the conduct of the Union warrants an expectation on the part of the applicant. This expectation must be prompted by an authoritative action of a public authority. This can be done either through a legislative action or an individual course of conduct.[252]

[248] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 204.

[249] Diana-Urania Galetta and Jacques Ziller, *EU Administrative Law* (Edward Elgar Publishing 2024) 136.

[250] Diana-Urania Galetta and Jacques Ziller, *EU Administrative Law* (Edward Elgar Publishing 2024) 136–137.

[251] Adrien Giraud, 'A Study of the Notion of Legitimate Expectations in State aid Recovery Proceedings: "ABANDON ALL HOPE, YE WHO ENTER HERE"?' (2008) 45 Common Market Law Review 1399, 1406.

[252] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 204.

The CJEU has further clarified that three specific conditions must be satisfied to rely on this principle. The first condition requires that precise, unconditional and consistent assurances must be given to the person concerned by authorised and reliable sources. The second condition requires that these assurances must be such as to give rise to a legitimate expectation for the addressee. The third condition requires that the assurances are consistent with the applicable rules.[253]

Furthermore, these conditions can be fulfilled through different scenarios. This is why Craig stresses the importance of distinguishing the different types of cases that can raise issues concerning legal certainty and legitimate expectations. These cases raise different considerations.[254] He categorises these cases as follows:

(a) "A public authority makes a formal decision concerning a person or a limited group of persons and then seeks to revoke that decision.

(b) A representation is relied on by a person or a group, and the administration later makes a decision that is inconsistent with the representation.

(c) A general norm or policy choice, which an individual or group has relied on, is replaced by a different policy choice.

(d) A general norm or policy choice is departed from in the circumstances of a particular case."[255]

In line with the purpose of this thesis, I will only consider the first category.

The CJEU has used different linguistic formulations of the legal protection against retroactive revocation of a lawful measure throughout its case law. The different linguistic formulations by the CJEU are, according to Craig, not intended to mean any differences in this legal protection.[256] The current general rule can be characterized as the retroactive withdrawal of a lawful administrative measure, which entails a benefit to an individual or a favourable decision, is generally subject to very strict conditions.[257] Craig holds that the

[253] Case T-758/18, *ABLV Bank*, ECLI:EU:T:2021:28, para 135; Case T-12/06, *Deltafina v Commission*, ECLI:EU:T:2011:441, para 190; Case T-145/06, *Omya v Commission*, ECLI:EU:T:2009:27, para 117.

[254] Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 605.

[255] Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 605.

[256] Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 608–609.

[257] Case T-123/89, *Chomel v Commission*, ECLI:EU:T:1990:24, para 34; Case 159/82, *Verli-Wallace v Commission*, ECLI:EU:C:1983:242, para 8; Case C-90/95, *De Compte v Parliament*, ECLI:EU:C:1997:198, para 39.

CJEU takes a relatively broad view of the notion of a benefit and the notion of a favourable decision.[258]

The ECJ stated in the *Santogal M-Comércio* case[259] that a person cannot have legitimate expectations that a favourable lawful administrative decision will stand if the decision is based on a situation that is characterised by fraud.[260] Furthermore, the CJEU has also taken a stance on decisions that are based on deception. In the *Euroagri* case[261], the CJEU held that if an application is approved based on factual information that is subsequently found to be incorrect, the resulting award decision is deemed unlawful. The Court further considers that these unlawful award decisions, in some circumstances, do justify the retroactive withdrawal of the award decisions.[262]

Craig emphasises nonetheless that there is a danger in equating fraud with misrepresentation, thereby failing to capture the differences regarding the permissibility of the retroactive revocation of a favourable decision. He states that there is a real difference between fraud and innocent misrepresentation and that, consequently, there are reasons for limiting the retroactive effect of a revocation. Finally, he argues that this distinction should, at the very least, be taken into consideration during the balancing process to determine whether the retroactive withdrawal of an illegal benefit should be allowed.[263]

In the *Algera* case[264] the CJEU established the general rule that unlawful decisions by the Union could be revoked retroactively if they are revoked within a reasonable period of time.[265] The assessment regarding what constitutes a reasonable period of time is based on the full evaluation of the principle of legal certainty and the principle of the protection of legitimate expectations.[266]

Regarding the expectations created by the Union through the annulment of an act by the Union judiciary, it is important, according to Raitio, to distinguish whether the administrative measure to be annulled is lawful or unlawful. This categorisation is based on the grounds of annulment[267] by the Union courts. If the ground for annulment is based on the faulty factual premises, then it is considered to be a revocation of a lawful act. If the ground for annulment is

[258] Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 609; Case 14/81, *Alpha Steel v Commission*, ECLI:EU:C:1982:76, para 30.
[259] Case C-25/16, *Santogal M-Comércio*, ECLI:EU:C:2017:453.
[260] Case C-25/16, *Santogal M-Comércio*, ECLI:EU:C:2017:453, para 76.
[261] Case T-180/01, *Euroagri v Commission*, ECLI:EU:T:2004:26.
[262] Case T-180/01, *Euroagri v Commission*, ECLI:EU:T:2004:26, para 87.
[263] Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 610.
[264] Joined Cases 7/56 and 3–7/57, *Algera*, ECLI:EU:C:1957:7.
[265] Joined Cases 7/56 and 3–7/57, *Algera*, ECLI:EU:C:1957:7.
[266] Case C-508/03, *Commission v United Kingdom*, ECLI:EU:C:2006:287, para 68.
[267] See subsection 2.2.3.

based on inadequacies concerning the interpretation of the law, then it is considered to be a withdrawal of an unlawful act.[268]

### 6.1.2 Step Two: Is there an expectation worthy of protection?

Step two of the test is assessing whether there is an expectation which is worthy of protection. Groussot emphasises that an expectation can only be considered to be legitimate after assessing the conduct of both the applicant and the Union. This conduct by the applicant and the Union is closely interlinked.[269]

With regard to the conduct of the applicant, the assessment is based on the situation in which it is apparent that the Union has led them to entertain reasonable expectations.[270] The CJEU has also formulated the requirement as the entitlement of the applicant to rely on the apparent legality of an act by the Union.[271] Furthermore, an expectation is more worthy of protection if the applicant has actually relied upon that expectation and made decisions based on the act by the Union. This holds especially true in cases where the applicant has already entered into irrevocable transactions.[272] However, when an applicant has committed a manifest infringement of EU law, they cannot rely upon the principle of the protection of legitimate expectations.[273]

With regard to the conduct of the Union, a promise from the Union that infringes on EU law can create a legitimate expectation that is worthy of protection. It is, however, more difficult than when a promise does not infringe on EU law.[274] The view that an assurance by the Union, even if it constitutes an infringement of EU law, can create a legitimate expectation that is worthy of protection is supported by Giraud. He states that because the notion of State aid and its compatibility are particularly complex, the doctrine of legitimate expectations must be extended to cases where the beneficiary could legitimately believe that the aid was lawful.[275] Furthermore, the concept of the Union issuing a warning is also of importance. The idea is that when the Union issues a warning as to the planned change to a legislation or similar, a prudent

[268] Juha Raitio, *The Principle of Legal Certainty in EC Law* (Kluwer Academic Publishers 2003) 225–227.

[269] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 207.

[270] Joined Cases C-37/02 and C-38/02, *Di Lenardo*, ECLI:EU:C:2004:443, para 70.

[271] Case C-90/95, *De Compte v Parliament*, ECLI:EU:C:1997:198, para 38.

[272] Case 74/74, *CNTA*, ECLI:EU:C:1975:59, para 42.

[273] Case T-73/95, *Oliveira v Commission*, ECLI:EU:T:1997:39, para 28.

[274] Case C-162/84, *Vlachou v Court of Auditors*, ECLI:EU:C:1986:56, paras 4–6; Case C-90/95, *De Compte v Parliament*, ECLI:EU:C:1997:198, paras 35–39.

[275] Adrien Giraud, 'A Study of the Notion of Legitimate Expectations in State aid Recovery Proceedings: "ABANDON ALL HOPE, YE WHO ENTER HERE"?' (2008) 45 Common Market Law Review 1399, 1403.

applicant is more likely to foresee the changes and thus their legitimate expectations are not as worthy of protection.[276]

The determination of whether a legitimate expectation is worthy of protection may be argued, according to Groussot, on two fundamental requirements: good faith and foreseeability. These two requirements are reflected in the conduct of both the applicant and the Union. Finally, the assessment of these requirements can only be conducted on a case-by-case basis.[277]

### 6.1.3 Step Three: Is there an overriding interest?

The balancing exercise in this part of the test is between the private interest of the applicant and the public interest. According to Groussot, it may be said that the public interest can serve as a justification for negative effects on private interests. The exact content of these interests is not predetermined and can only be assessed on a case-by-case basis.[278] This balancing act between public and private interests has been employed by the CJEU.[279]

Despite this lack of established interests, some interests are almost always present. In accordance with the purpose of this thesis, this subsection will include interests which are particular to the State aid context.

#### *6.1.3.1 The public interest*

In the *SNUPAT* case[280] the CJEU held that the public interest include the principle of legality and that the withdrawal of an illegal act is done in respect of the principle of legality.[281] The notion of the principle of legality, according to Raitio, can be concluded as having the objective of the general interest of society as a whole.[282] In the context of State aid proceedings and for the purpose of this thesis, the effectiveness of the Standstill obligation ought to be considered within the public interest. In particular, the public interest includes the two purposes as emphasised by Jaeger. The first is to protect individuals from the consequences of illegal State aid. The second is to safeguard the

[276] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 209; Case 74/74, *CNTA*, ECLI:EU:C:1975:59, paras 43–44.

[277] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 209–210.

[278] Xavier Groussot, *General Principles of Community Law* (Europa Law 2006) 210–212.

[279] For a pedagogical judgment, see Joined Cases T-116/01 and T-118/01, *P & O European Ferries*, ECLI:EU:T:2003:217.

[280] Joined Cases 42/59 and 49/59, *SNUPAT v High Authority*, ECLI:EU:C:1961:5.

[281] Joined Cases 42/59 and 49/59, *SNUPAT v High Authority*, ECLI:EU:C:1961:5, page 87.

[282] Juha Raitio, *The Principle of Legal Certainty in EC Law* (Kluwer Academic Publishers 2003) 200.

effectiveness of the notification obligation.[283] The GC has emphasized the prevention of distortion in the internal market as an important public interest. This interest includes the protection of third-party competitors.[284]

In addition to the main interests mentioned above, other interests must also be taken into account. In the context of State aid proceedings and for the purpose of this thesis, it is of public interest to consider of the perspective of the competitors to the beneficiary of State aid. This point is reaffirmed again, specifically in light of the principle of judicial protection and the right to an effective remedy.[285] Finally, the concept of the rule of law is important to take into consideration, as it is one of the founding values of the Union, pursuant to Article 2 TEU.

#### *6.1.3.2 The private interest*

In the *SNUPAT* case[286] the CJEU held that the private interest of beneficiaries is the good faith that they have assumed.[287] This is still true in the State aid context. The literal interpretation of the Standstill obligation, as stated in Article 108(3) TFEU and Article 3 of the Procedural Regulation, is that the prohibition on the implementation of the proposed State aid vanishes when the Commission has authorized, through a final decision, the proposed State aid. As this obligation no longer applies, the beneficiaries are no longer subject to the recovery and interest associated with the the measure.[288] This private interest can also be formulated as an interest in legal stability, or as an interest in relying on the stability of the economic situation afforded by the measure.[289]

Furthermore, another interest regarding the private interest includes the avoidance of the hardship that arises if the beneficiary is subject to a recovery of State aid. The sums which the beneficiary is liable to repay can be substantial and particularly costly due to the accumulated recovery interest.[290]

## 6.2 Legal Certainty and the Protection of Legitimate Expectations in State Aid Proceedings

[283] See subsection 3.3.2; Thomas Jaeger, 'The CELF-Judgement: A Precarious Conception of the Standstill Obligation' (2008) 7(2) European State Aid Law Quarterly 279, 282.
[284] Joined Cases T-116/01 and T-118/01, *P & O European Ferries*, ECLI:EU:T:2003:217, para 208.
[285] See subsection 2.1.
[286] Joined Cases 42/59 and 49/59, *SNUPAT v High Authority*, ECLI:EU:C:1961:5.
[287] Joined Cases 42/59 and 49/59, *SNUPAT v High Authority*, ECLI:EU:C:1961:5, page 87.
[288] See subsection 3.3.2 and 4.2.
[289] Juha Raitio, *The Principle of Legal Certainty in EC Law* (Kluwer Academic Publishers 2003) 235.
[290] See subsection 3.3.3 and 3.3.4.

### 6.2.1 General

The granting of State aid towards a beneficiary is considered to be a beneficial administrative act. The question of legal certainty and the protection of legitimate expectations arises in a situation where the beneficiary is at risk of the recovery of the unlawful State aid. Thus, the plea of legal certainty and the protection of legitimate expectations is used to prevent the recovery of unlawful aid.[291] The possibility of successfully preventing a recovery on the grounds of legal certainty and the protection of legitimate expectations, may be possible according to Raitio. He argues that if the aid has been granted in a formally correct way under Article 108 TFEU, then it may be possible for the beneficiary to prevent recovery.[292]

Tridimas emphasises that two separate issues arise in these situations. The first is whether or not the Commission is prevented from ordering the recovery of the unlawful aid. The second is whether or not the Member State is prevented from enforcing the recovery of such aid.[293] Consistent with the purpose of this thesis, the focus will be on the second issue: when the Member State is prevented from enforcing the recovery. According to the case law of the CJEU, if the beneficiary of a State aid measure is subject to the recovery of implemented State aid, it must bring the matter before the national court to plead the principles of legal certainty and legitimate expectations. If the national court considers it necessary, it may obtain a preliminary ruling from the CJEU on the interpretation whether the plea can preclude the recovery.[294] This last part is, however, disputed. According to Giraud, this case law is only applicable when the Member State has its own national rule of legitimate expectations.[295]

The plea of an infringement of the principle of legal certainty and the protection of legitimate expectations is available to the beneficiaries who have received unlawful State aid. However, the chances of success with this plea is limited. The CJEU has held that this plea, regarding recovery of unlawful State aid, can only be applicable to on exceptional circumstances.[296] According to Giraud, the case law of the CJEU is far from being its most transparent

291 Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 292–293.

292 Juha Raitio, *The Principle of Legal Certainty in EC Law* (Kluwer Academic Publishers 2003) 235.

293 Takis Tridimas, The General Principles of EU Law (2nd edn, Oxford University Press 2006) 292–293.

294 Case T-459/93, Siemens v Commission, ECLI:EU:T:1995:100, paras 104–105. Case C-5/89, *Commission v Germany*, ECLI:EU:C:1990:320, para 16. Case T-109/01, *Fleuren Compost v Commission*, ECLI:EU:T:2004:4, para 137.

295 Adrien Giraud, 'A Study of the Notion of Legitimate Expectations in State aid Recovery Proceedings: "ABANDON ALL HOPE, YE WHO ENTER HERE"?' (2008) 45 Common Market Law Review 1399, 1423.

296 Case C-5/89, *Commission v Germany*, ECLI:EU:C:1990:320, para 16; Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 294.

work. He argues that the Court's case law lacks transparency, suggesting that to describe it merely as "unclear" would be an understatement.[297] The particular circumstances in which a positive decision by the Commission has been annulled have been assessed by Grespan, Pelin, and Rossi. They state that the beneficiary cannot plead the protection of legitimate expectations because the time limit under Article 263 TFEU has not yet expired, meaning the decision is not yet definitive.[298] Nonetheless, there still exists case law, although under different circumstances within the State aid context, where a legitimate expectation plea has been successful.[299]

### 6.2.2 Similar Cases Decided by the CJEU

The CJEU has elaborated on the circumstances under which beneficiaries can rely on exceptional circumstances. In the *Spain v Commission* case[300] the Court stated that a beneficiary cannot entertain a legitimate expectation that the aid was lawful if the Member State did not follow the procedure laid down in Article 108 TFEU. The CJEU stated that the mandatory nature of Article 108 TFEU, which obliges Member States to notify the Commission of any planned State aid measures, precludes the creation of legitimate expectations for the beneficiary. It further stated that a diligent operator should normally be able to determine whether the procedure in Article 108 TFEU has been followed.[301]

The question is what happens when the Commission, in accordance with the procedure set out in Article 108 TFEU, decides to approve a State aid measure and subsequently, the Union courts annuls the decision.

According to the *Graphischer Maschinenbau v Commission* case[302] the GC held that the beneficiary of such State aid cannot rely on a positive decision approving such aid by the Commission, pursuant to Article 108 TFEU, if the time period for bringing an action against that decision, under Article 263 TFEU, has not expired.[303] I think that the circumstances of this case make it difficult to apply as a precedent for other cases. The Member State implemented part of the measure before notifying the Commission, thus not following the procedure set out in Article 108 TFEU. Furthermore, the case was lodged by the beneficiary against the Commission's partial positive decision.

[297] Adrien Giraud, 'A Study of the Notion of Legitimate Expectations in State aid Recovery Proceedings: "ABANDON ALL HOPE, YE WHO ENTER HERE"?' (2008) 45 Common Market Law Review 1399, 1400.

[298] Davide Grespan, April Pelin and Luca Rossi, in Nicola Pesaresi and others (eds), *EU Competition Law* (Edward Elgar Publishing 2016) 1417–1418.

[299] See e.g. Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416, paras 147–167.

[300] Case C-169/95, *Spain v Commission*, ECLI:EU:C:1997:10.

[301] Case C-169/95, *Spain v Commission*, ECLI:EU:C:1997:10, para 51.

[302] Case T-126/99, *Graphischer Maschinenbau v Commission*, ECLI:EU:T:2002:116.

[303] Case T-126/99, *Graphischer Maschinenbau v Commission*, ECLI:EU:T:2002:116, para 42.

The beneficiary sought to annul the part of the decision that limited the amount of State aid which was approved.[304] Moreover, the GC held this position when assessing the plea alleging that the Commission had committed various errors of law or manifest errors of assessment vitiating the conclusion that the criterion of inducement was not satisfied. This means that the GC assessed the application of Article 107 TFEU and not the consequences of not following Article 108 TFEU.[305] This is why I think it is difficult to give this case a particular precedential weight on this matter.

In the *Regione autonoma della Sardegna v Commission* case[306] the GC held, as in the previous case, that it is only once the final positive decision by the Commission has been adopted and the period for bringing an action against that decision has expired, that a beneficiary can plead the principle of the protection of legitimate expectations. This case concerns a planned State aid measure that was not implemented.[307] Thus, I think that the circumstances of this case make it difficult to apply as a precedent.

Furthermore, according to the *Italy v Commission* case[308] the ECJ held that the beneficiary cannot be certain that the proposed aid is lawful until the Commission has taken a decision approving the aid and the period for bringing an action, pursuant to Article 263 TFEU, has expired.[309] In this case, the Member State notified the Commission of the planned State aid, pursuant to Article 108 TFEU. The Commission thereafter partially approved the State aid measure, but it did not approve the 15% bonus of the gross grant which was available for small and medium-sized enterprises. The Member State lodged an action for annulment, under Article 263 TFEU, and sought to have the Court annul the decision in so far as it did not allow the bonus of 15 %. The Member State's plea in law consisted of three parts: (1) infringement of the Community rules governing State aid to small and medium-sized enterprises, (2) infringement of Article 108(1) TFEU, and (3) infringement of the principles of legal certainty and the protection of legitimate expectations.[310] The ECJ held that the Commission did not breach any of these parts.[311] With regard to the second (2) part of the plea, that part was based on the first (1) part and thus it was dismissed quickly.[312] With regard to the context of this case, it only concerned the application of Article 107 TFEU, and not Article 108 TFEU. Thus,

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304 Case T-126/99, *Graphischer Maschinenbau v Commission*, ECLI:EU:T:2002:116, paras 1–14.

305 Case T-126/99, *Graphischer Maschinenbau v Commission*, ECLI:EU:T:2002:116, paras 24 & 42.

306 Case T-171/02, Regione autonoma della Sardegna v Commission, ECLI:EU:T:2005:219.

307 Case T-171/02, *Regione autonoma della Sardegna v Commission*, ECLI:EU:T:2005:219, paras, 1, 13–14, and 65.

308 Case C-91/01, *Italy v Commission*, ECLI:EU:C:2004:244.

309 Case C-91/01, *Italy v Commission*, ECLI:EU:C:2004:244, para 66.

310 Case C-91/01, *Italy v Commission*, ECLI:EU:C:2004:244, paras 27–30.

311 Case C-91/01, *Italy v Commission*, ECLI:EU:C:2004:244, paras 58, 61 & 67.

312 Case C-91/01, *Italy v Commission*, ECLI:EU:C:2004:244, paras 59–61.

I think it is difficult to give this case a particular precedential weight on this matter.

Moreover, in the first *CELF and Ministre de la Culture et de la Communication* case[313] the ECJ stated that as long as the positive decision by the Commission has not become final and binding, meaning that the period for bringing an action against that decision has not expired, the beneficiary is not entitled to the protection of legitimate expectations. The same is applicable when an action for annulment has been brought and the Union courts has not yet delivered a definitive ruling.[314] The case concerned an agreement between a Member State and a beneficiary called CELF. They had an agreement that CELF would supply book orders to overseas territories. Some of these book orders were unprofitable and for in exchange for fulfilling these orders, CELF received operating subsidies from the Member State. A competitor of CELF, called SIDE, asked the Commission if whether had been notified under 108 TFEU of the aid granted to CELF. The Commission confirmed the existence of the aid and that it had not been notified. The Commission later decided that the aid to CELF constituted lawful aid under Article 107 TFEU. SIDE brought an action for annulment against this decision under Article 263 TFEU and the GC upheld the action. The Commission then opened a formal investigation procedure and later adopted a positive decision declaring the aid lawful under Article 107 TFEU. SIDE brought another action for annulment against this decision under Article 263 TFEU and the GC upheld the action. The Commission later adopted a positive decision once again and declared the aid lawful. SIDE brought another action for annulment against this decision under Article 263 TFEU and the GC once again upheld the action.[315] During these proceedings at the GC, proceedings were brought in the national courts. SIDE requested that the aid scheme and the aid granted by the Member State to be stopped and repaid. The national case resulted in a reference for a preliminary ruling under Article 267 TFEU by the national court. The first question concerned the stand still obligation in Article 108(3) TFEU.[316] The second question concerned how the interest on unlawful State aid should calculated with regard to the positive decisions by the Commission. Should the period between the positive decision by the Commission and when the GC annuls the decision be included in the calculation of interest? Essentially asking whether the decision by the Commission, which later was annulled, had

[313] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79; For ease of reference and to provide the necessary context for the following discussion, key aspects of the judgment are recalled here.

[314] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 67–68.

[315] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 2–21; Case T-49/93, *SIDE v Commission*, ECLI:EU:T:1995:166; Case T-155/98, *SIDE v Commission*, ECLI:EU:T:2002:53; Case T-348/04, *SIDE v Commission*, ECLI:EU:T:2008:109.

[316] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 22–32; See also subsection 4.1 for a more detailed discussion concerning the first question.

any effect on the calculation of interest.[317] In the Court's reasoning for the second question, the Court made important remarks on the aspect of legal certainty and legitimate expectations.[318]

The legal analysis of the ECJ began by assessing the legal effects of the decision by the Commission and the annulments by the GC. First, the ECJ stated that decisions by the EU are presumed to be lawful and they produce legal effects until otherwise.[319] Secondly, the ECJ stated that the Union courts' decision of annulment leads to the retroactive disappearance of the contested act.[320] The ECJ then explained how the presumption of lawful decisions and the retroactive effect of an annulment should be interpreted in the context of the State aid recovery. The interpretation by the ECJ is that the rule of the retroactive effect of an annulment takes precedence over the presumption of lawful decisions. This means that the positive decision by the Commission does not have any legal effects with regard to the interest calculation if the decision is subsequently annulled by the Union courts.[321] The ECJ continued by analysing whether these contradictory decisions by the Commission and the GC could give rise to legitimate expectations. The Court stated that as long as the period for bringing an action for annulment has not expired, and until the Union courts have delivered a definitive ruling, the beneficiary cannot be sure of the lawfulness of the State aid measure.[322]

The dispute in the national legal system continued and resulted in another reference for a preliminary ruling. The national court in the second *CELF and Ministre de la Culture et de la Communication* case[323] asked two questions; the first was whether the national court could stay the proceedings until the Commission had ruled on the compatibility of the aid after the annulment of a previous positive decision. The ECJ stated that the national court may not stay the proceedings. It reasoned that it would render the Standstill obligation ineffective if the national court could stay the proceedings.[324] The second question was whether the three positive decisions by the Commission and subsequent three annulments by the GC could justify a limitation of the repayment of the aid. The referring national court seemed, according to the ECJ,

[317] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 56.
[318] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 65–68.
[319] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 60.
[320] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, para 61.
[321] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 62–64 & 69.
[322] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79, paras 67–68
[323] Case C-1/09, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2010:136.
[324] Case C-1/09, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2010:136, paras 31–32 & 40.

to suggest that the circumstances of this case might amount to an exceptional circumstance. The ECJ confirmed its previous stance by stating that a positive decision by the Commission cannot give rise to legitimate expectations if the decision has been challenged through Article 263 TFEU, if the time limit for bringing an action for annulment has not yet expired, or if the Union courts have not delivered a definitive ruling on the matter. The ECJ further elaborated that in these circumstances, the beneficiary cannot rely on the principle of legal certainty due to the same reasons as in the protection of legitimate expectations.[325]

As to the applicability in these two *CELF and Ministre de la Culture et de la Communication* cases[326] the circumstances of the case remain that the Member State implemented the State aid measure before notifying the Commission and thus did not follow the procedure set out in Article 108 TFEU. The applicability of these cases has also been highlighted by Jaeger. He argues that the first case, on which the second case is mainly based upon, may be limited as a precedent for other cases due to its exceptional circumstances, which are the persistent back-and-forth between authorizations and annulments. He argues that this restrictive interpretation of the judgment is supported by the Court's reasoning in the case. The ECJ begins addressing both exceptional circumstances and the protection of legitimate expectations of the beneficiary, outlining when it is inappropriate to order the recovery of the aid. The mention of limiting factors to the recovery is situated between, firstly, the affirmation of the principles of recovery and effectiveness, and, secondly, the limited aim of the Standstill obligation and the limitation to only recover the interest.[327]

The cases discussed in this subsection suggest that a beneficiary is unable to rely on the principles of legal certainty and the protection of legitimate expectations to avoid recovery, in a situation where the Member State did implement the State aid measure pursuant to the final positive decision by the Commission, but then subsequently the Union judiciary annulled that positive decision. However, the CJEU has not been sufficiently precise. In all these cases, this can only be inferred by reading the *obiter dicta* parts of the judgments. This issue is particularly problematic as the judgments in this subsection have all concerned situations where the Member State has implemented the State aid measure before receiving authorization from the Commission. In light of this uncertainty and in order to answer the research question, an

[325] Case C-1/09, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2010:136, paras 41, 45, 48, 51, 53.

[326] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2008:79; Case C-1/09, *CELF and Ministre de la Culture et de la Communication*, ECLI:EU:C:2010:136.

[327] Thomas Jaeger, 'The CELF-Judgement: A Precarious Conception of the Standstill Obligation' (2008) 7(2) European State Aid Law Quarterly 279, 289.

assessment based on the method in Subsection 6.1 is warranted to determine the current legal situation.

## 6.3 The Assessment of the Infringement of the Principles of Legal Certainty and the Protection of Legitimate Expectations

As discussed in previous subsection,[328] the assessment is difficult to apply as it relies on the specific circumstances of the individual case. This is why the situation in which the assessment of determining an infringement of the principle of legal certainty or the principle of the protection of legitimate expectations will be based on the circumstances of the upcoming cases in *C-329/25 SAS AB v Kingdom of Denmark* and *C-442/25 SAS AB v Staten genom Justitiekanslern* (Sweden). As the circumstances of these cases are quite extensive, only the essential details will be discussed in order to remain within the thesis's intended scope.

On August 11, 2020, Denmark and Sweden formally notified the Commission of a State aid measure for approval, which the Commission approved on August 17, 2020. Denmark and Sweden implemented the measure on October 26, 2020. An action for annulment was brought on May 4, 2021, and the GC annulled the Commission's decision on May 10, 2023.[329] After the annulment, on November 29, 2023, the Commission issued a new decision approving the aid measure already implemented by Denmark and Sweden, subject to certain conditions. This decision, on July 9, 2024, was changed to a positive decision by the Commission.[330]According to the conclusions drawn in Subsection 4.3, this implemented State aid measure should be subject to recovery. Can the beneficiary, in this situation, plead an infringement of the principles of legal certainty and the protection of legitimate expectations to avoid recovery or the interest related to it?

In a prior assessment of comparable circumstances, Giraud predicted that such a scenario would not validate the applicability of the principle of the protection of legitimate expectations. The circumstances Giraud based his assessment on were almost the same as those used in this thesis, but instead of a subsequent positive decision by the Commission after the annulment, he

[328] See subsection 6.1.

[329] While the action for annulment may initially appear to have been lodged outside the period prescribed by Article 263 TFEU. However, due to the Court's method of calculating time (see Articles 59–60 of the Rules of Procedure of the General Court) and the fact that the Commission published the decision on 12 February 2021, the action is considered to be within the time limit; See also Case T-238/21, *Ryanair v Commission (SAS II ; COVID-19)*, ECLI:EU:T:2023:247.

[330] **Conditional decision**: Case SA.57543 and SA.58342, Scandinavian Airlines System (SAS) [2024] OJ L/2024/2549; **Positive decision**: Case SA.114648 and SA.114657, Amendment to SA.57543 and SA.58342, [2025] OJ C/2025/2780.

assumed a negative decision. Giraud argues, first, that the beneficiary cannot reasonably believe that a decision will produce permanent effects until it has become definitive. Second, if the Court were to accept the plea, it could effectively undermine the appeal system for State aid decisions.[331]

### 6.3.1 Step One

As for the first step of the method, the purpose is to assess whether or not any expectation has arisen on the part of the applicant.

In this situation, the assurance has come from the Commission through a positive decision authorizing the Member State to implement the measure. This assurance should be considered to come from an authoritative and reliable source, as the Commission is the gatekeeper for the implementation decision for State aid, according to Article 108(3) TFEU.

The subsequent annulment by the GC should be, according to Subsection 6.1, considered to be a withdrawal of an unlawful act. The annulment by the GC was based on that the Commission failed to consider some provisions in the Temporary Framework regarding the equity instrument.[332]

This decision by the Commission is deemed to be adequately precise, unconditional, and broadly consistent with prior administrative practice. Consequently, the beneficiary is considered to have entertained expectations with regard to step one.

### 6.3.2 Step Two

As for the second step of the assessment, the objective is to assess whether the expectation is worthy of protection.

With regard to the conduct of the applicant, the applicant has relied upon this expectation and made decisions based upon it. The beneficiary has received, through the equity instrument, business funding meaning the applicant has already entered into irrevocable transactions.[333] With regard to the conduct of the Union, the assurance given by the Commission through its positive authorization decision is, according to the judgment by the GC, an infringement

[331] Adrien Giraud, 'A Study of the Notion of Legitimate Expectations in State aid Recovery Proceedings: "ABANDON ALL HOPE, YE WHO ENTER HERE"?' (2008) 45 Common Market Law Review 1399, 1412.

[332] Case T-238/21, *Ryanair v Commission (SAS II ; COVID-19)*, ECLI:EU:T:2023:247, para 81.

[333] See subsection 6.1.1.

of EU law.[334] It is nonetheless still possible that the expectation is worthy of protection.[335]

Furthermore, the determination is ultimately based on the good faith and foreseeability of the situation. In this case, the beneficiary has relied upon this decision by the Commission and entered into irrevocable transactions. Additionally, the conduct by the Commission cannot be deemed a significant deviation from the foreseeability regarding the application of Article 107 TFEU. Thus, I believe that these circumstances warrant the protection of the expectation.

### 6.3.3 Step Three

As for the third step of the method, the purpose is to assess what the overriding interest is.

In this case, the public interest is regarded as comprising: the principle of legality, the effectiveness of the standstill obligation, the interests of competitors, the protection of the internal market, the principle of judicial protection, and the right to an effective remedy.[336]

The private interest is regarded as: the good faith of the beneficiary, the foreseeability of the procedure, the interest of legal stability, and the economic hardship that may affect the beneficiary.[337]

If the private interest in this scenario were to prevail over the public interest, it would effectively render the Commission's positive decisions impossible to effectively challenge and prevent the judgments of the Union courts from being effectively remedied in a practical sense. Should the beneficiary successfully avoid recovery, the resulting distortion would inevitably undermine competition within the internal market. In such a scenario, the competitors' right to an effective remedy would be rendered illusory. As the Union has the rule of law as one of its fundamental values, it is very important to consider the right to have a decision subject to judicial review.

Consequently, the plea in law of an infringement of the principles of legal certainty and the protection of legitimate expectations cannot be upheld, as the public interest is superior to private interest. This remains the case despite the significant hardship the beneficiary will bear, even though it committed no wrongdoing.

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[334] Case T-238/21, *Ryanair v Commission (SAS II ; COVID-19)*, ECLI:EU:T:2023:247, para 81.

[335] See subsection 6.1.1.

[336] See subsection 6.1.3.1.

[337] See subsection 6.1.3.2.

# 7 Conclusion

This thesis has explored and assessed the framework of EU State aid law, and, in particular, the Standstill obligation set out in Article 108(3) TFEU, in light of judicial review, together with the principles of legal certainty and the protection of legitimate expectations.

The first part of the thesis examined the legal consequences of having a positive Commission decision authorizing State aid annulled by the Union judiciary, particularly regarding the Standstill obligation when a Member State has implemented the measure after following the correct procedure laid down in Article 108 TFEU. The conclusion drawn in the first part of the thesis is that the Standstill obligation comes into force *ex tunc* and that the aid measure implemented by the Member State pursuant to the positive decision by the Commission authorizing the measure, should be regarded as unlawful from the time it was implemented.

The second part of the thesis examined whether the unclear position stemming from the first part can constitute the applicability of the principles of legal certainty and the protection of legitimate expectations in order to preclude the recovery of the State aid measure. The conclusion drawn in the second part of this thesis is that these principles are not applicable in such a scenario. This is because the public interest is superior to private interests, in particular the importance of effective judicial protection and the right to an effective remedy.

The findings of this thesis raise critical questions regarding the efficacy of the EU State aid framework. In circumstances requiring immediate liquidity, particularly during periods of crisis, the current framework appears insufficient to handle the expeditious response necessary for aid measures to achieve their intended impact.

In the pending cases C-329/25 *SAS AB v Kingdom of Denmark* and C-442/25 *SAS AB v Staten genom Justitiekanslern* (Sweden), the ECJ ought to answer the first and second questions referred by the national courts by stating that the beneficiary remains obliged to pay interest on the unlawful State aid measure from the date of implementation.

One suggestion for reform is for the Commission to inform the beneficiaries, when authorizing the proposed measure by the Member State, that the wording of the Standstill obligation in reality implies that the final decision needs to become definitive. This would not capture the issue of circumstances requiring immediate liquidity, but it would at least eliminate any legitimate expectations on the part of the beneficiary.

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