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A DISPUTE AVOIDANCE MECHANISM FOR TRANSFER PRICING IN THE EU

STATE AID HALLMARKS: A REVIEW OF LEGAL CERTAINTY IN LIGHT OF STATE AID RISKS

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Sincerely,

Antonio

List of Abbreviations

Advance Price Arrangement (APA)

Advocate General (AG)

Articles (Art.)

Articles (Arts)

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA)

Basis Erosion Profit Shifting (BEPS)

Chapter (Cpt)

Comparable Uncontrolled Price (CUP)

Compare (Cf)

Confédération Fiscale Européenne (CFE)

Country-by-Country (CbC)

Country-by-Country Reporting (CBCR)

Directive on Administrative Cooperation (DAC)

Edition (Ed)

European Commission (EC)

European Court of Justice (CJEU)

European Union (EU)

GC General Court

International Monetary Fund (IMF)

Joint Transfer Pricing Forum (JTPF)

Multinational Enterprise (MNE)

Mutual Agreement Procedure (MAP)

Organization for Economic Co-operation and Development (OECD)

Pages (pp)

Paragraph (Para)

Section (Sec)

Sequent (seq.)

Transactional Net Margin Method (TNMM)

Transfer Pricing (TP)

United Nations (UN)

1. Introduction

1.1. Background and problem statement

Disputes are considered one of the inevitable consequences of law uncertainty.[1] Different interpretations, the complexity of rules or the retroactive effect of law are some examples of the source of the vagueness and uncertainty of laws.[2] The Organization for Economic Co-operation and Development (OECD) initiated a global agenda to formulate policies promoting legal certainty, with a specific focus on addressing uncertainty in tax laws.[3] In the European Union (EU), preventing the occurrence of disputes and ensuring legal certainty for taxpayers has been a declared primary objectives of the European Commission (EC).[4] Disputes are costly and time-consuming, and citizens have expressed a preference for increased intervention at EU level to prevent disputes before they arise, using mechanisms designed for dispute avoidance (also known as dispute prevention mechanisms).[5] The quotation from Erasmus, "*prevention is better than cure*", also appears to be applicable in the domain of tax law.[6] Dispute avoidance mechanisms differ from dispute resolution in that the former aim to prevent disputes by assessing the legal risk of the *ex-ante* position, rather than providing certainty on an *ex-post* basis.

In this context, the legal certainty principle plays a fundamental role, especially within the international tax law framework.[7] According to the Court of Justice of the EU (CJEU), legal

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[1] According to the Permanent Court of International Justice, a dispute is "*a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons [States]",* Case Mavrommatis Palestine Concessions, 1924. About law uncertainty, see: M.L. Marceddu, 'The EU Dispute Settlement: Towards Legal Certainty in an Uneven International Investment System? European Investment Law and Arbitration review', (2016), Vol.1(2), p. 33-75.

[2] S. B. Lawsky, 'Modeling uncertainty in tax law'(2013) *Stan. L. Rev.* 65, 241; A. V. Demin, 'Certainty and Uncertainty in Tax Law: Do Opposites Attract?' (2020) *Laws* 9.4, 30.

[3] OECD/International Monetary Fund (IMF), 'The OECD /IMF Report on Tax Certainty' (2017) G20 Meeting, March 2017, 62; D. Mehboob, 'OECD advances its tax certainty agenda ahead of digital tax reform' (2020) *International Tax Review*, 62.

[4] For more information about the EC cf: 2.5.3. European Commission, 'Communication from the Commission to the European Parliament and the Council, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy', COM (2020) 312 final, 2020.

[5] Responses to the public consultation on the evaluation of the Directive on Administrative Cooperation in taxation, summarised in annex 2 of European Commission, 'Commission staff working document Evaluation of the Council Directive (EU) no 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC' (SWD (2019)328 final).

[6] William Watson Barker, *The Adages of Erasmus*, (University of Toronto Press, 2001), 17

[7] In March 2017, the OECD and the IMF published a report on tax uncertainty (http://www.oecd.org/tax/g20 report-on-tax-certainty.htm) (Report) confirming that tax uncertainty exists and impacts on business and investment. Similar was the outcome of a survey conducted by the Oxford University Centre for Business Taxation: Measuring Corporation Tax Uncertainty Across Countries (http://eureka.sbs.ox.ac.uk /6292/1/WP1613.pdf). See also C. García Novoa, *El principio de seguridad jurídica en materia tributaria*, (Marcial Pons, 2000), 91 and 104; J. Kammerhofer, *Uncertainty in International Law, A. Kelsenian Perspective*, (Routledge, 2010). D. Zolo, 'The Rule of Law: A Critical Appraisal', (2007) The Rule of Law: History, Theory and Criticism 3, 24, contending that a state must guarantee foreseeability in the law. H. Leawoods and G. Radbruch,

certainty is an EU principle that requires legal systems must strive for certainty, enabling taxpayers to predict the legal consequences of their actions.[8] The rights of taxpayers to predict the legal consequences of their actions may be realized through various legal instruments, all of which fall under the umbrella of the principle of legal certainty.[9]

From a temporal standpoint, the rights of taxpayers to legal certainty can be achieved either on an *ex-ante* basis or on an *ex-post* basis.

Dispute avoidance mechanisms are among the legal instruments designed to provide (on an ex-ante basis) early legal certainty and reduce the risk of disputes by anticipating confrontational situations between taxpayers and tax administrations.[10] Dispute avoidance mechanisms are also the preferred solution proposed by the OECD/IMF in their reports on "*tax certainty*."[11] According to the reports, early certainty is more effective for investments, as it reduces the risk of disputes.[12]

Taxpayer rights to legal certainty can also be realized on an *ex-post* basis. Taxpayers have the option to seek the protection of the legal certainty principle before a court, where judges are required to assess (*ex-post*) whether the level of legal uncertainty exceeds an acceptable threshold. This would be the case if taxpayers cannot anticipate the legal consequences of their actions.[13] Thus, while legal uncertainty is not entirely prohibited, a certain degree of uncertainty can be accepted, provided that taxpayers can still foresee the effects of their actions and ensure that their tax position complies with the law.[14]

Amongst all the fiscal issues, Transfer Pricing (TP) is arguably the most uncertain and disputed issue globally.[15] Since its inception, ,[16] the wording of TP provisions has been considered

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'An Extraordinary Legal Philosopher' (2000), Washington University Journal of Law & Policy 489, 493, in which the author affirms that legal certainty along with justice and policy it is one of only three fundamental pillars of the very idea of law.

[8] Case C-183/95, *Affish BV*, EU :C :1997 :373, para. 57.

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

[10] P. Kovač, 'The potentials and limitations of tax dispute prevention and alternative resolution mechanisms', (2018) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 39.4, 1505-1528.

[11] OECD/IMF, 'The OECD /IMF Report on Tax Certainty' (2017) G20 Meeting, March 2017. OECD has been promoting tax certainty via other several instruments. On May 27, 2022 the OECD announced that it is seeking public comments on the following two consultation documents relating to tax certainty that it released on that same date: a Tax Certainty Framework for Amount A; and Tax Certainty for Issues Related to Amount A under Pillar One.

[12] H. C. Holte and L. Angvik. 'Q&A: OECD FTA head prioritizes tax certainty'(2018) *Int'l Tax Rev.* 29, 28.

[13] J. Raitio, *The principle of legal certainty in EC law*. (Vol. 64. Springer Science & Business Media, 2003). Pg?

[14] L. Osofsky, 'The case against strategic tax law uncertainty', (2010)" *Tax L. Rev.* 64, 489.

[15] The glossary of tax terms of the OECD defines Transfer price as "*the price charged by a company for goods, services or intangible property to a subsidiary or other related company. Abusive transfer pricing occurs when income and expenses are improperly allocated for the purpose of reducing taxable income*". In relation to the importance of transfer pricing, see T. Hatzichronoglou, 'The Globalisation of Industry in the OECD Countries', (1999) OECD Science, Technology and Industry Working Papers, No. 1999/02.

[16] The first Transfer Pricing rule was enacted in the United Kingdom with the UK Finance Act of 1915, Sec 31 (3) and in the United States with the War Revenue Act of 1917, Sec.208.

remarkably confusing[17] and their level of uncertainty has become somewhat standard.[18] Despite the inherent lack of predictability in TP's multinational dimension - TPs are significant for both taxpayers and tax administrations because they largely determine the taxable profits of associated enterprises in different tax jurisdictions.[19] OECD member countries have chosen the separate entity approach as the most appropriate means for achieving equitable results and minimizing the risk of unrelieved double taxation.[20] According to this approach, each individual group member of a multinational enterprise is subject to tax on the income arising to it. For the application of the separate entity approach to intra-group transactions, each entity of the group must be taxed considering they act at arm's length, as set out in paragraph 1 of Article 9 of the OECD Model Tax Convention.[21] Under the arm's length standard, controlled transactions within a group are compared to transactions between unrelated entities under comparable circumstances to determine acceptable transfer prices.[22] The rationale is based on the market forces, which govern most of the transactions in an economy, and it is widely considered appropriate to treat intra-group transactions as equivalent to those between independent entities.[23] The application of arm's length standard to transactions between entities of MNEs is not an exact science. Therefore, the uncertainty surrounding TP and the arm's length standard has led to numerous disputes.[24] To address this challenge, tax rulings, such as advance price arrangements (APAs), are considered valid dispute avoidance mechanisms aimed at securing ex-ante certainty and preventing costly disputes.[25]

While TP has globally been the most disputed tax matter, tax rulings have been proven to be a valid dispute avoidance mechanism.[26] In the EU, individual tax rulings of several MNEs

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[17]J. Seidman, *Seidman's Legislative History of Federal Income Tax Laws, 1938-1861*, (Prentice Hall, 1938), 46.

[18]Y. Brauner, 'Transfer Pricing in BEPS: First Round — Business Interests Win (But, Not in Knockout)', (2015) Yariv Brauner, Intertax, Volume 43, Issue 1, pp. 39-44.

[19] J. Monsenego, I*ntroduction to Transfer Pricing*, (Wolters Kluwer Law & Business, 2013), 3.

[20] See Chapter C.1., 'The Arm's Length Principle, A non-Arm's-Length Approach: Global Formulary Apportionment' in OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TP Guidelines 2022)*, (OECD Publishing, 2022), 34-38.

[21] The term "arm's length principle" itself is not a term specifically used in Article 9 OECD Model of Tax Convention on Income and on Capital (MTC), but it is well accepted by countries as encapsulating the approach taken in Art 9 OECD MTC, 2022; See, *inter alia*, Paragraph 1 of the UN Model and OECD Model Commentaries on Art. 9. See also T. Nielsen, 'The Arm's Length Test: A Rule of Law or an Excuse for Arbitrary Taxation?' (1979) 8 Intertax 296.

[22] H. Kato and H. Okoshi, *Production Location of Multinational Firms under Transfer Pricing: The Impact of the Arm's Length Principle*, (Springer, 2018), 57.

[23] For some criticism to the arm's length principle, see A. Biegalski, 'The Arm's Length Principle: Fiscalism or Economic Realism? A Few Reflections', (2010) Intertax, Volume 38, Issue 3, 34, 35.

[24]R. Robillard, 'BEPS: Is the OECD Now at the Gates of Global Formulary Apportionment?', (2015) Intertax, Volume 43, Issue 6 & 7, 65, 66.

[25] P. Kortebusch, 'Should multinational companies request an advance pricing agreement (APA)-or shouldn't they?' (2014) No. 173. Discussion Paper; K. Sadiq, 'The taxing effects of the advance pricing arrangement program: A review of APAs and their impact on stakeholders'(2007) Journal of Australian Taxation 10.1, 104-132; L. L. Gormsen and C. Mifsud-Bonnici, 'Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax'.(2017) Journal of European Competition Law & Practice 8.6, 1-14; M. R. Tambunan, H. Rosdiana, and E. Slamet Irianto, 'Advance Pricing Agreements: A Step Forward in Transfer Pricing Dispute Resolution? A Story From Developing Countries'(2020), Journal of Taxation of Investments 37.4; P. Valente, 'Advance Pricing Arrangements: Optimal Tool–Optimal Framework?' (2020) Intertax 48.1.

[26]I. Szabó, Advance Tax Ruling in the domestic and international dimensions. Conference book Konferenciakötet, 2016.

including Amazon[27], Engie[28], Fiat[29], Mc Donald's[30], Huhtamäki[31] in Luxembourg; Apple[32]in Ireland; the Belgian Ruling System[33]in Belgium; Starbucks[34], Ikea[35], Nike[36] in the Netherlands, and the UK tax scheme for MNE[37] in United Kingdom have been subject to dispute by the EC. This in line with the EC's obligation to employ State aid rules to regulate competition within the EU internal market.[38]

In the EU, member states are prohibited from providing certain forms of State aid to undertakings without prior authorization by the EC.[39] The State aid prohibition is a crucial component of European Competition law, aimed at ensuring that competition is not distorted or threaten to be distorted within the internal market by member states.[40] While a direct subsidy to a specific undertaking is the most straightforward example of State aid, it can also encompass measures such as a reduction in taxes otherwise due (e.g., a tax exemption), as long as this confers an advantage to certain undertakings. State aid provided through tax

[27]Preliminary Decision SA 38944 (Amazon) of 07.10.2014, followed by a negative Decision with recovery on 04.10.2017 (court Cases T-816/17, T-318/18).
[28]Preliminary Decision SA 44888 (Engie) of 19.09.2016, followed by a negative Decision with recovery on 20.06.2018 (Court Cases T-525/18, T-516/18).
[29]Preliminary Decision SA 38375 (Fiat) of 11.04.2014, followed by a negative Decision with recovery on 21.10.2015 (Court Cases T-759/15, T-755/15).
[30]Preliminary Decision SA 38945 (McDonald's) of 03.12.2015, followed by a Decision finding that the measure do not constitute aid (after formal investigation procedure) on 19.09.2018.
[31]Preliminary Decision SA 50400 (Huhtamäki) of 07.03.2019.
[32] Preliminary Decision SA38373 (Apple) of 11.06.2014, followed by a negative Decision with recovery on 30.08.2016 (Court Cases T-778/16, T-892/16/, C-12/18, C-678/17).
[33]Preliminary Decision SA37667 (Tax Ruling system – excess profit exemption) of 03.02.2015, followed by a negative Decision with recovery on 11.01.2016. On February 2019, the General Court rendered judgment on the case T-131/16 where it was argued that the Commission had failed to demonstrate the existence of an aid scheme and hence, the Commission's Decision of 11.01.2016 was annulled in its entirely.
[34]Preliminary Decision SA38374 (Starbucks) of 11.06.2014, followed by a negative Decision with recovery on 21.10.2015 (Court Cases T-760/15, T-636/16, T-877/16).
[35]Preliminary Decision SA46470 (Ikea) of 18.12.2017.
[36]Preliminary Decision SA51284 (Ikea) of 10.01.2019.
[37] Preliminary Decision SA44486 (UK CFC Group financing exemption) of 26.10.2017 followed by a negative Decision with recovery on 21.10.2015 and partly is justified.
[38] Cf: 3.2, 3.3.
[39] Cf. 3.2.4; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, Official Journal C 326, 26/10/2012 P. 0001 – 0390; See also M. Cini, 'The soft law approach: Commission rule-making in the EU's state aid regime'.(2001) Journal of European Public Policy 8.2, 192-207.
[40] T. Jaeger, 'Tax incentives under State aid law: A competition law perspective'.in I. Richelle, W. S., E. Traversa *State aid law and business taxation*. (Springer, 2016), 39-57. Different theories exist in the literature regarding on the content of the "competition" that State aid aim at protecting. On the one hand, it has commonly assumed that that term refers mainly to the competition between private undertakings instead of fostering an actual competition that leads to an increase in consumer welfare: See e.g. C. Ahlborn and C. Berg, 'Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules in A. Biondi, P. Eeckhout, and J. Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press 2004), 48. See also E. Forrester, 'Is the State Aid regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?' (2018) 27 EC Tax Review 19, 30-35. However, as held in the *Gibraltar* case (Joined Cases C-106/09 P and C-107/09 P, *EC v. Government of Gibraltar*, ECLI:EU:C:2011:732, it is admissible an impact on the tax competition between Member States.

instruments is commonly referred as 'fiscal' State aid. In line with Art. 107 TFEU and the jurisprudence of the CJEU, the notion on State aid relies on four criteria that must be jointly fulfilled to consider aid incompatible with primary EU law.[41] It is widely acknowledged in the literature that advantage and selectivity are the two most challenging criteria in State aid analysis.[42] According to recent CJEU jurisprudence, evaluating the existence of an advantage requires identifying the correct reference system, while assessing selectivity involves conducting a comparability analysis between undertakings to avoid discrimination.[43] For the EC, the concept of non-discrimination is central to the notion of selectivity, representing an application of the general principle of equal treatment.[44]

According to recent studies, *ex-post* investigations by EC into individual tax rulings have undermined the *raison d'être* of dispute avoidance mechanisms, specifically, their ability to *provide ex-ante* legal certainty.[45] While tax rulings have proven effective as dispute avoidance mechanism within domestic legal frameworks, the same cannot be asserted when it comes to avoiding EU State Aid disputes.

The unforeseeable nature of *ex-post* EC investigations on dispute avoidance mechanisms, along with the new interpretation provided therein, has caught most investigated member states and MNEs by surprise, including major players like Apple and Amazon. In response, these MNEs

[41]Art. 107 of the Consolidated version of the Treaty on the Functioning of the European Union (TFEU) - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS - Chapter 1: Rules on competition - Section 2: Aids granted by States - Article 107 (ex-Article 87 TEC) OJ C 115, 9.5.2008, p. 91–92. See, e.g., Joined Cases C-20/15 P and C-21/15 P *Commission v. World Duty Free Group Banco Santander SA, and Santusa Holding SL*, ECLI:EU:C:2016:981, para. 53.

[42]Another source of uncertainty is the conflation of the two tests adopted by the European Commission. The literature is divided about this point. In favour of the separated analysis Cf.: H. Lopez, 'General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters', (2019) 9 European State Aid Law Quarterly 807, 809; U.S. Department of the Treasury White Paper, 'The European Commission's Recent Investigations of Transfer Pricing Rulings' (2016), 6; K. Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions' (2018), 18 Hous. Bus. & Tax L.J. 1. For the opposite opinion, see R. Szudoczky, *The Sources of EU Law and their Relations: Lessons for the Field of Taxation*, (IBFD 2014), 580; R. Lyal, 'Transfer Pricing Rules and State Aid', (2015), 28 Fordham International law Journal 1017, 1031; L. Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 Journal of European Competition Law & Practice 369, 376.

[43] Currently, there is a debate relating to whether the selectivity criterion should be limited to a discrimination test. See W. Schön, 'Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence' in Isabelle Richelle, Wolfgang Schön and Edoardo Traversa (eds), *State Aid Law and Business Taxation* (Springer 2016), 8-14. The CJEU has determined selectivity with a derogation approach, see e.g., Joined Cases C-20/15 P and C-21/15 P, *European Commission v. World Duty free Group*, ECLI:EU:C:2016:981, paras 54 and 75.

[44] See C. Quigley, *European State Aid Law and Policy* (3rd ed., Hart Publishing, 2015), 64.

[45] A. Bal, 'Tax Rulings, State Aid and the Rule of Law', in R.F. van Brederode (ed), *Ethics and Taxation*, , (Springer 2020), 359-377; K. Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions', (2018)18 Hous. Bus. & Tax L.J. 1; A. Taferner and J. Wouda Kuipersu, 'Tax Rulings: In Line with OECD Transfer Pricing Guidelines, but Contrary to EU State Aid Rules? European Taxation', (2016) Volume 56, No 4;. L. Liu, 'Is American Multinational Enterprises' Honeymoon with the European Union Over? An Analysis of the European Commission's Investigations into American Multinational Enterprises' Tax Deals with Ireland, Luxembourg and the Netherlands', (2018) 41 Loy. L.A. Int'l & Comp. L. Rev. 71; C. Bobby, 'A Method inside the Madness: Understanding the European Union State Aid and Taxation Rulings', (2017) *Chicago Journal of International Law*: Vol. 18: No. 1, Article 5. A. Haines and A. Schwanke, 'Multinationals and the EC Engulfed in State Aid Disputes', (2016) 27 Int'l Tax Rev. 27.

have invoked legal certainty protection to resist State aid recovery.[46] Within State aid law, the legal certainty principle is not only a standalone EU legal principle but also serves to protect taxpayers from the EC recovery orders when the legal effect of the State aid law is considered unforeseeable.[47] However, in the recent Fiscal State aid case concerning tax rulings both the General Court (GC) and the EC have rejected the claims of member states and taxpayers.[48] In other words, both GC and EC have denied the *ex-post* protection from State aid recovery based on the legal certainty principle. Many of these cases are currently pending before the CJEU.[49] The concept of retroactivity in State aid recovery may be viewed as a form of retroactive taxation, raising concerns about its applicability with the legal certainty principle.[50] Nonetheless, "*retroactive taxation*" is deemed acceptable as long as it does not violate general principles of EU law, including the legal certainty principle.

In conclusion, within the current fiscal State aid law framework and considering recent prominent TP cases before EU Courts, taxpayers lack a viable dispute avoidance mechanism to forestall State aid-related disputes with the EC. The reliance on the legal certainty principle, even to avert ex-post State aid recovery, is limited due to the GC and EC's reluctance to extend protection via the legal certainty principle. The US Department of Treasury contends that the EC's adoption of new enforcement regimes with retroactive effect hampers companies' "*ability to assess risks*" and plan for the future.[51] Remarkably, prior to the EC's investigations in 2014, none of the companies had acknowledged a "*risk of State aid investigations*" in their audited financial statements.[52] Overall, this new wave of EC investigations may pose challenge to the G20 agenda aimed at enhancing tax certainty.[53]

1.2. Purpose of the Research

The thesis addresses a twofold problem within the current State aid law framework, with a specific focus on TP disputes, highlighting the challenge of achieving legal certainty from both *ex-ante* and *ex-post* perspective.

From an *ex-post* standpoint, both the EC and the GC demonstrate reluctance in granting the protection under the legal certainty principle to waive State aid recovery. This thesis delves into the case law of the CJEU, examining cases within and beyond State aid, to assess instances where the CJEU deems the level of legal uncertainty unacceptable from an EU law perspective.

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[46] See State Aid Tax ruling case: SA 44896, SA 38945, SA 44888, SA 38944, SA 38373, SA 37667, SA 38375. Se the EC website: https://competition-policy.ec.europa.eu/state-aid/tax-rulings_en.
[47] Cf. 2.4.
[48] Cf. 3.4.3 and all cases reported therein.
[49] Except Fiat, see Joined Cases C-885/19 and C-898/19 P, *Fiat Chrysler Finance Europe vs Commission*, ECLI:EU:C:2022:859, 2022.
[50] Cf 3.4.
[51] U.S. Dept't of the Treasury, The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings, 56 (2016), para 1. See also C. HJI Panayi, Advanced Issues in International and European Tax Law, Hart Publishing, 2015, pp. 317, 338.
[52] Ibid, para 3.
[53] Ibid, para 1.

In the specific context of State aid rules and TP disputes, I argue that obtaining protection based on the legal certainty principle is *quasi-impossible* for the taxpayers, despite it being a general principle of EU law.

In my normative proposal, I contend that the EU legal framework does not necessitate the introduction of a new legal certainty principle. Instead, within State aid law framework, it is imperative to interpret the CJEU jurisprudence of the general principle of legal certainty less narrowly. This broader interpretation would allow, at the very least, the possibility of obtaining legal certainty protection when the new law interpretations can be qualified as unforeseeable. Rather than embracing a dualistic concept of legal certainty – either all or nothing, certain or uncertain – I advocate for accepting a gradually verifiable concept.[54] The term "Legal Risk" is proposed to express this graduality, offering a recognized solution to measure uncertainty. In scrutinizing the risk concept as a potential solution, I will investigate whether the CJEU employs the concept of risks, either directly or indirectly, to verify a minimum level of law uncertainty before deciding on whether to grant State aid recovery.

From an *ex-ante* perspective, the EC State aid investigations on tax rulings have eroded the ability of tax rulings to offer *ex-ante* legal certainty and prevent State aid disputes. The results of these investigations underscore the absence of a dispute avoidance mechanism for State Aid investigations on TP transactions. To restore *ex-ante* legal certainty, I advocate for the implementation of a dispute avoidance mechanism, grounded in an exchange of information mechanism, specifically designed for fiscal State aid investigations. This proposed mechanism, termed "*Fiscal State aid hallmarks*", involves identifying legal risk-based arrangements that signify a high risk of State aid disputes.[55] These hallmarks offer a nuanced approach to uncertainty by introducing a gradual level of risk assessment, moving beyond the binary distinction of certain or uncertain.

1.3. Originality and innovativeness

The originality of this thesis rests on significant and distinctive aspects:

(i) The introduction of the concept of legal risk as a novel approach to defining and comprehending legal certainty and uncertainty. This concept serves as a key instrument in formulating(ii) "*Fiscal State aid hallmarks*", offering indicators of the risk of potential investigation by the EC for violations of State aid law. While the risk concept is utilized by the EC, by tax authorities, and taxpayers in their respective assessments, this thesis stands as the first scholarly work to present the notion of State aid risk (State aid Hallmarks) as a tool to enhance legal certainty and mitigate the risk of State aid disputes.

[54]A.-L. Valembois, La *Constitutionnalisation de l'exigence de sécurité juridique en Droit français*, (LGDJ, 2005), 252.
[55] State aid disputed is intended as the opening of the investigation by the EC.

The thesis also makes other original contributions:

(i) Original contributions within the State aid recovery legal framework, offering insights on how taxpayers can leverage the legal certainty protection when the effects of State aid law are considered unforeseeable;

(ii) Exploration of the potential confluence between foreseeability analysis (inherent to the principle of legal certainty) and the assessment of compatibility with State aid criteria (relevant to compliance with Article 107 TFEU), particularly in adjudicating claims founded upon the principle of legal certainty. This exploration sheds light on the potential confusion between the legal certainty and the legitimate expectations principle.

(iii) Highlighting distinctions between the legal uncertainty and legal risks to present a novel approach to legal risks. The thesis explores the CJEU's approach in evaluating claims based on the legal certainty principle and the EU legislator's approach to drafting risk factors, anticipating transactions with a significant risk of dispute.

The distinctive contribution of the thesis lies not only in its findings but also in its methodology, which integrates insights from various disciplines, including economics, management, EU law, and legal theory. This interdisciplinary approach addresses a gap in the existing literature, providing a comprehensive understanding of the interplay between tax certainty, legal certainty, and legal risk – issues of paramount importance in contemporary legal discourse.

1.4. Research Questions

This thesis delves into the nuances of legal uncertainty and legal risk, with a specific focus on TP transactions scrutinized by the EC within the State aid law framework.

The first question addresses why taxpayers, invoking the protection of the legal certainty principle, have faced challenges in securing a waiver of State aid recovery concerning TP transactions investigated by the EC. The ensuring observations will culminate in a normative claim advocating for a broader interpretation of the legal certainty principle.

Building upon the first question, the second question introduces the concept of legal uncertainty. This research question examines the CJEU's interpretation of the legal certainty principle and assesses the viability of the concept of risk concept (State aid risk) as a metric for gauging various levels of legal uncertainty. The thesis argues for a nuanced approach - replacing the binary distinction of legal certainty/legal uncertainty with a granular perspective – to enhance the prospect of obtaining a waiver of State aid recovery.

The third question investigates the relationship between legal uncertainty, legal risks, and dispute avoidance mechanisms. It explores how an elevated level of certainty or heightened awareness of legal risks can mitigate disputes. Additionally, the inquiry aims to ascertain whether the establishment of fiscal State aid hallmarks, grounded in fiscal State aid risks, could serve as a valuable tool in addressing the deficiency of dispute avoidance mechanisms in State aid investigations.

1.5. Limitations

This thesis operates within specified boundaries to ensure clarity on the scope of the research.

(i) While TP can have also implications in indirect taxation, this study concentrates exclusively on direct taxation.

(ii) Given the diverse forms of State aid, the thesis narrows its scope to APAs tax rulings linked to TP cases.

(iii) The analysis of double tax treaties is limited to exploring their potential State aid implications, particularly in the context of the allocation of taxing rights between associated enterprises residing in different member states or between a member state and a third country. The arm's length standard is a paramount concept of taxation that may be applied in several types of tax rules, such as rules concerning the attribution on profits to permanent establishments,[56] the determination of a maximum relief of source taxation of royalty income,[57] the determination of a certain limit for the deduction of interest expenses.[58] For the purpose of this analysis, the application of the arm's length standard is studied when relied on for the allocation of the corporate tax basis between associated enterprises resident in different member states or between a member state and a third country.[59] The arm's length standard in the context of income taxes on individuals or indirect taxes will not be addressed. Furthermore, this thesis does not seek to provide possible alternatives to arm's length TP, e.g., so-called "*formulary*".[60] The selected fiscal State aid hallmarks are based on available

[56] See OECD MTC Commentary on Art.7 (2) para 16, OECD, 2017 Model Tax Convention on Income and on Capital: Condensed Version 2017. See also OECD, 'Report on the Attribution of Profits to Permanent Establishments' (OECD 2010), part I, 12, para 8; 'the authorized OECD approach is that the profits to be attributed to a PE are the profits that the PE have earned at arm's length'.

[57] See OECD MTC Commentary on Art. 12(4) para 23 of the 2017 OECD Model Tax Convention.

[58] European Council, Council Resolution of 8 June 2010 on coordination of the Controlled Foreign Corporation (CFC) and thin capitalization rules within the European Union (2010) OJ C 156/1, Preamble: "thin capitalization rules which observe the arm's length principle are capable of preventing tax avoidance, or maintaining the balanced allocation of taxing powers, or both".

[59] See Art. 9 of the 2017 OECD Model Tax Convention.

[60] For an overview of the features of formulary apportionment, see J. Andrus and P. Oosterhuis, 'Transfer Pricing After BEPS: Where Are We and Where Should We Be Going', (2017) Taxes the Tax Magazine, 96; M. Pankiv, *Contemporary Application of the Arm's Length Principle in Transfer Pricing* (IBFD, 2017), 38-42. For a comparison between formulary apportionment and the arm's length principle, see S. Langbein, 'The Unitary Method and the Myth of Arm's Length', (1986) 30 Tax Notes Int'l, 625; J. Turro, 'U.S. Congressional Committee Blasts Foreign Firms for Tax Dodging', (1990)

information, including case law, and EU law, as of the finalization date of the thesis. The selected fiscal State aid hallmarks are based on available information, including case law and EU law, as of the finalization date of the thesis. These hallmarks may be subject to complementation, development, or amendment, or amendment in the future, considering new case law and forthcoming EU laws.

1.6. Methodology

The thesis employs a legal doctrinal method to analyze State aid law and the legal certainty principle. The analysis draws from CJEU legal doctrine, GC case law, and EC decisions.[61] Additionally, the study relies on the interpretation of legal text, including EU primary and secondary law, tax treaties, domestic provisions, draft laws, soft laws, and academic literature.

A primary objective is to understand the meaning of Article 107 TFEU and its relationship with the arm's length standard and all tax-ruling decisions. The challenges arise from the systematization of soft law being applied as hard law. Although the State aid criterion is rooted in hard law, various sources from soft law provide guidance. The formulation of Article 107(1) TFEU is general, and its interpretation aligns with previous CJEU case law on State aid criteria, especially within the context of tax benefits. Non-tax and State aid-related case law is referenced when relevant to the study's objectives, particularly in understanding and interpreting the legal certainty principle.

The thesis places a central focus on the concept of legal risk, offering an alternative interpretation and analysis of the legal certainty principle in the context of fiscal State aid investigations on tax rulings. Given that the concept of risk extends beyond a purely legal framework, academic sources from disciplines such as economics, and management are consulted to explore whether the CJEU subtly incorporates the concept of risk and, if not, how it could be relevant in the legal realm. The scope of the thesis is limited to a theoretical approach, with the possibility of further empirical research to validate the proposed approach.

Tax Notes Int'l, 797; L. M. Kauder, 'Intercompany Pricing and Section 482: A Proposal to Shift from Uncontrolled Comparables to Formulary Apportionment Now', (1993) 58 Tax Notes Int'l, 485; K. Sadiq, 'Unitary Taxation – The Case for Global Formulary Apportionment', (2001) 55 Bulletin for International Fiscal Documentation 7, 275; D.R. Hardy, 'Assignment of Corporate Opportunities – The Migration of American Intangibles', (2006) PLI/Tax,34-35; M.C. Durst, 'It's Not Just Academic: The OECD Should Reevaluate Transfer Pricing Laws', (2010) 57 Tax Notes Int'l 247; J. A. Burke, 'Re-Thinking First Principles of Transfer Pricing Rules', (2011)30 Virginia Tax Review 3, 102; L.E. Schoueri, 'Arm's Length: Beyond the Guidelines of the OECD', (2015) 69 Bulletin for International Taxation 12, 690.

[61] Cf. H. Emerson Tiller and F.B. Cross, 'What is Legal Doctrine?' (2006), Northwestern University Law Review 100, 517.

1.7. Outline

The first Chapter: Introduction. The opening Chapter serves to set the stage for the study, offering an overview of the key issues under examination. It kicks off by underscoring the pivotal role of legal certainty, a concept accentuated by the G20/IMF and OECD in their tax certainty project.[62] This project places a particular emphasis on early certainty, endorsing the use of dispute avoidance mechanisms. To provide a contextual backdrop for the ensuing discussions, a presentation of the legal framework of State aid rules follows, shedding light on the background that has spurred current investigations into dispute avoidance mechanisms, specifically focusing on tax rulings concerning TP transactions. Moving forward, the Chapter introduces the central thesis of the study, outlining the research questions to be addressed and setting forth the thesis's limitations. To guide the reader through the study's structure and methodology, the Chapter concludes with a discussion of the chosen research approach and an overview of the subsequent chapters.

Chapter Two: Uncertainty: a common criterion to evaluate legal certainty and tax certainty introduces two of the cornerstones of the thesis, legal certainty and tax certainty. The Chapter serves as a fundamental exploration on two pivotal concepts in the thesis – legal certainty and tax certainty. It begins by highlighting the prioritization of tax certainty as the common goal for policy makers as suggested by OECD, IMF, G20 and other EU institutions. The Chapter delves into a comprehensive discussion and comparison between legal certainty, a general principle of EU law, and tax certainty, a concept uniquely tailored to the realm of taxation. The aim is to highlight commonalities and distinctions between these fundamental notions. A historical overview traces the evolution of the legal certainty principle, dissecting its development within EU law, with a specific focus on the jurisprudence of the CJEU. To comprehend the application of the legal certainty principle in the current State aid investigations on TP issues, the chapter delineates crucial distinctions between legal certainty and the legitimate expectations principle and other sub-principles. Central to this exploration is an assessment of whether legal certainty has been or can be achieved in the backdrop of the prominent fiscal State aid cases related to tax rulings. The Chapter contends that a precise understanding of legal certainty is paramount, particularly in its correlation to another key concept in this thesis – legal risk. The narrative illustrates how both legal certainty and legal risk are negatively defined by uncertainties. Moreover, the legal certainty principle emerges as a guiding principle for judges, aiding them to evaluate (ex-post) whether the uncertainties surrounding effects of laws were foreseeable before the taxpayer's action. This Chapter seeks to unravel the intricate connections and distinctions between legal certainty, tax certainty, and legal risk, laying the ground for the subsequent exploration of these concepts in the context of fiscal State aid investigations.

[62] OECD/International Monetary Fund (IMF), 'The OECD /IMF Report on Tax Certainty' (2017) G20 Meeting, March 2017, 62

Chapter Three: Fiscal State aid: the lack of legal certainty protection of dispute avoidance mechanism. Building upon the groundwork laid in the preceding chapter and the principle of legal certainty, this Chapter aims to scrutinize the extent to which *ex-post* protection under the legal certainty principle is effectively applied in the ongoing State aid investigations related to tax rulings - form of dispute avoidance mechanisms. The Chapter initiates with an elucidation of the general legal framework of State aid law, emphasizing fiscal State aids. Subsequently, it provides an in-depth review of the current State aid investigations focusing on dispute avoidance mechanism, particularly APAs for TP transactions. The core inquiry revolves around the applicability of the legal certainty principle in these cases. Towards this purpose, the thesis unfolds by demonstrating that CJEU jurisprudence does not permit domestic dispute avoidance mechanisms to confer legitimate expectations towards State aid EC investigations. The Chapter proceeds to show that both the GC and the EC have effectively deprived taxpayers of protection against recovery orders, thereby negating the shield provided by the legal certainty principle. The thesis contends that this outcome arises from a conflation of the legal certainty principle, legitimate expectations, the foreseeability test (which forms the basis for assessing legal certainty protection) and the State aid compatibility test (which serves to evaluate the compatibility of deemed State aid with the internal market). In navigating this complex framework, the Chapter argues that the responsibility ultimately falls upon the CJEU to determine whether taxpayers are granted full protection under the legal certainty principle or not. The ensuing sections will delve into the intricacies of this interplay, providing a critical analysis of the CJEU's role in ensuring the comprehensive protection of legal certainty for taxpayers.

Chapter Four: Risks, Uncertainty and Dispute avoidance mechanism: Fiscal State Ais Hallmarks. This Chapter embarks on an exploration of the existing dispute avoidance mechanisms for TP and elucidates their correlation with the legal certainty principle. The discourse unfolds by introducing the pivotal concept of risk and delineating its interaction with the legal certainty principle. The Chapter elucidates how the concept of risk contributes to assessing the probability of disputes within dispute avoidance mechanisms. In this context, the narrative introduces the broader concept of uncertainties as a common metric in defining tax certainty, legal certainty, and legal risk. A systematic proposal is then presented to mitigate legal uncertainty within dispute avoidance mechanisms concerning State aid investigations. This proposed systematization involves recognizing fiscal State aid as an independent source of uncertainty. Acknowledging that the EC may appraise risk differently from tax authorities, the subsequent step is to identify hallmarks serving as indicators of risk factors. These hallmarks encompass elements such as tax rulings, specific TP methods, downward adjustments, and subject to tax clause. The overarching goal is to curtail the risk of disputes and, to some extent, assess the foreseeability of State aid investigations. This Chapter unfolds as a comprehensive exploration into the interplay of risks, uncertainties, and dispute avoidance mechanisms within the landscape of fiscal State aid.

Chapter Five - Conclusion. The concluding Chapter serves as a synthesis of the findings presented in the preceding chapters. The overarching conclusion drawn from the exploration of the current State aid investigations on dispute avoidance mechanisms is that the protection of the legal certainty principle remains elusive, both in the ex-ante nor ex-post context. The *ex-post* protection rooted in the legal certainty principle is acknowledged as a right under EU law. However, despite the recognition of this right, the application of the legal certainty principle by the EC and GC appears to deviate from its intended scope. Contrary to the argument posed by the EC and the GC, legal certainty protection extends beyond mere adherence to legitimate expectations, challenging the notion that it necessitates a stringent "*precise assurance*" requirement. Furthermore, the safeguard from State aid recovery, as grounded in the legal certainty principle, necessitate a foreseeability test rather than a State aid compatibility analysis currently undertaken by the EC and the GC. In light of these observations, the thesis advocates for the consistent application of the legal certainty principle in the examined cases, aligning with its precent in the broader CJEU jurisprudence. Recognizing the procedural challenges in affording the *ex-ante* protection due to the absence of a valid dispute avoidance mechanism, the thesis introduces the concept of "*State aid hallmark*s". These hallmarks, treating State aid investigations as an independent risk, aim to rectify the current situation and offer an instrument to enhance ex-ante legal certainty for taxpayers, through these proposals, the thesis seeks to contribute to the ongoing debate on legal certainty and dispute avoidance mechanisms within the context of fiscal State aid investigations.

2. Uncertainty: A Common Criterion to Evaluate Legal Certainty and Tax Certainty

2.1. Introduction

The legal certainty principle is a well-established topic in legal studies, recognizing that uncertainties are inherent in legal orders, particularly within the framework of tax law.[63] The principle asserts that legal systems should strive for certainty to enable taxpayers to anticipate the legal consequences of their actions.[64] In the current period, both the OECD and the IMF have identified an escalating level of tax uncertainty, with particular focus on TP transactions, which are not only highly affected by legal uncertainty but also widely disputed on a global scale.[65]

Within the EU, TP transactions have become subjects of several disputes through fiscal State aid investigations conducted by the EC.[66] Aligned with its responsibility to employ State aid rules to regulate competition within the EU internal market, the EC has recently initiated State aid proceedings related TP individual APAs. APAs represent a form of "*dispute avoidance mechanisms*" designed to provide *ex-ante* legal certainty for taxpayers engaged in transactions between related entities within the same multinational enterprise, commonly known as Transfer Pricing (TP).[67] Recent studies indicate that the EC investigations have had a detrimental impact on the effectiveness of dispute avoidance mechanisms, undermining their ability to provide *ex-ante* legal certainty.[68] This shift in the landscape underscores the evolving challenges in maintaining ex-ante legal certainty, particularly in the realm of TP transactions.

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[63] H. Gribnau, 'Legal certainty: A matter of principle'. in H. Gribnau, M. Pauwels, *Retroactivity of Tax Legislation, May* (IBFD, 2013); S. B. Lawsky, 'Modeling uncertainty in tax law'.(2013) *Stan. L. Rev.* 65, 241; A. V. Demin, 'Certainty and Uncertainty in Tax Law: Do Opposites Attract?'.(2020) *Laws* 9.4, 30. D. V. Bizer, and J. L. Kenneth, 'Taxation and uncertainty'(1989) *The American Economic Review* 79.2, 331-336. G. T. Pagone, 'Tax uncertainty' (2009) *Melbourne University Law Review* 33.3,886-907.

[64] D. Deák, Neutrality and legal certainty in tax law and the effective protection of taxpayers' rights. (2008) *Acta Juridica Hungarica* 49.2,177-201.

[65] A. Pross, S. Knaepen, and M. Johnson, 'Embracing Tax Certainty through Improved Dispute Resolution'(2017), *Int'l Tax Rev.* 28, 16; C. H. Holte, and L. Angvik. 'Q&A: OECD FTA head prioritizes tax certainty' (2018) *Int'l Tax Rev.* 29, 28.

[66] N. Hrushko, 'Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU Member States' Tax Rulings'.(2017) *Brook. J. Int'l L.* 43, 327.

[67] A. Gunn, and J Luts, 'Tax rulings, APAs and state aid: legal issues'(2015) *EC Tax Rev.* 24, 119.

[68] A. Bal, 'Tax Rulings, State Aid and the Rule of Law', in R.F. van Brederode (ed) *Ethics and Taxation*, (Spinger 2020, 359-377; K. Richard, 'Are All Tax Rulings State Aid: Examining the European Commission's Recent State Aid Decisions', (2018)18 Hous. Bus. & Tax L.J. 1; A. Taferner and J. Wouda Kuipersu, 'Tax Rulings: In Line with OECD Transfer Pricing Guidelines, but Contrary to EU State Aid Rules?' (2016) European Taxation, Volume 56, No 4., L. Liu, 'Is American Multinational Enterprises' Honeymoon with the European Union Over? An Analysis of the European Commission's

Taxpayers, including multinational enterprises such as Apple, Amazon, and others, whose APAs were investigated by the EC for potential violations of EU State aid law, have sought to establish legal certainty. They have petitioned the CJUE to assess whether the legal effects resulting from the EC's interpretation can deemed unforeseeable.[69] In this context, legal certainty operates as a guiding principle, aiding judges in evaluating (*ex-post*) whether the level of legal uncertainty surpasses an acceptable threshold, making it challenging for taxpayers to anticipate the legal consequences of their actions.[70] The legal certainty principle holds particular relevance within State aid law, serving as a protective mechanism for taxpayers against the EC's recovery order when the legal effects of the State aid law are considered unforeseeable. However, both the EC and the GC do not effectively recognize the *ex-post* protection afforded by legal certainty principle, citing various reasons. In summary, within the framework of EU State Aid law, taxpayers utilizing dispute avoidance mechanisms find themselves deprived of their right of legal certainty, both in the *ex-ante* and *ex-post* context.

The primary objective of this thesis is to enhance legal certainty through effective dispute avoidance mechanisms. This Chapter lays the groundwork for comprehending the existing uncertainties in tax law, the interpretation of the legal certainty principle within the framework of EU law, and the role played by EU institutions (CJEU and EC), in enhancing legal certainty. These foundation concepts will prove instrumental in the subsequent Chapters. In Chapter three, we delve into the potential application of the legal certainty principle for protection during an EC investigation into State aid granted through tax rulings. Furthermore, these concepts will be pivotal in Chapter four, aiding in the distinction between legal uncertainty and legal risk, and facilitating an understanding of the nuances between ex-ante and ex-post legal certainty protection.

This Chapter is organized into six sub-Chapters, with the first and the last dedicated to the introduction and partial conclusion, respectively.

The second sub-Chapter begins by emphasizing the global political emphasis on tax certainty advocated by the G20/IMF/OECD globally, and within EU by the EC. Given that TP is identified as a significant source of tax uncertainty, this section provides a general introduction of TP rules. More specific aspects of TP will be explored in subsequent Chapters. The sub-Chapter then delves into what qualifies as a "*dispute avoidance mechanism*" and why such mechanisms are recommended by OECD/IMF as a solution to enhance tax certainty, investments, and trade.

Investigations into American Multinational Enterprises' Tax Deals with Ireland, Luxembourg and the Netherlands', (2018) 41 Loy. L.A. Int'l & Comp. L. Rev. 71; C. Bobby, 'A Method inside the Madness: Understanding the European Union State Aid and Taxation Rulings', (2017) *Chicago Journal of International Law*: Vol. 18, No. 1, Article 5; A. Haines and A. Schwanke, 'Multinationals and the EC Engulfed in State Aid Disputes', (2016) 27 Int'l Tax Rev. 27.

[69] E. Paunio, 'Beyond predictability–reflections on legal certainty and the discourse theory of law in the EU legal order' (2009) German Law Journal 10.11 1469-1493.

[70] J. Raitio, *The principle of legal certainty in EC law* (Vol. 64. Springer, 2003), 45.

The third sub-Chapter introduces the central concept of legal certainty, which is the focus of this thesis. It begins by acknowledging that uncertainties have been a persistent challenge in legal sciences. It then explains the provision of legal certainty on both an *ex-ante* and *ex-post* basis. A comparison between legal certainty (as a general principle of law) and tax certainty (as intended by the IMF/OCED) follows, supporting the argument that only *ex-ante* certainly aligns with OECD/IMF tax certainty objectives. The discussion also touches on the quasi-irrelevance of *ex-post* protection provided by the judiciary as a remedy, which evaluates the taxpayers' right to benefit from the protection offered by the legal certainty principle-particularly in the context of investments.

In the fourth sub-Chapter, the exploration of legal certainty will be contextualized within the scope of EU law and its interpretation by the CJEU. It essential to recognize that a more precise definition of legal certainty can only be established within specific legal frameworks and jurisdictions. Given that this thesis aims to enhance the legal certainty of TP transactions within the EU State aid law framework, the definition of the legal certainty principle will primarily rely on the EU legal framework. A subsequent sub-section will draw a distinction between the legitimate expectations principle and the legal certainty principle. Understanding the differences between legal certainty and its sub-principles, including the legitimate expectations principle, is crucial for grasping how the EC and the GC apply the legal certainty principle in ongoing State aid investigations related to TP issues.

In the fifth sub-Chapter, we delve into the roles of the EC and the CJEU in fostering legal certainty. The objective is to elucidate how these EU institutions can contribute to legal certainty and to clarify the distinction between legal certainty and legitimate expectations. Our argument posits that legal certainty can only be provided by the CJEU, while member states and the EC potentially contributing to legal uncertainty. Moreover, the EC can offer legitimate expectations, but only to a limited extent.

2.2. Tax Certainty: A Current Policymakers' Priority to Reduce the Risk of Dispute and Foster Investment

2.2.1. Introduction

This thesis represents a follow-up to the ongoing political priority of the OCED/IMF on enhancing tax certainty. This initial section aims to introduce the reader to (i) the definition of "*tax certainty*" - as envisaged by OECD/IMF - (ii) to TP rules, recognized as a major source of global tax uncertainty, and (iii) to dispute avoidance mechanisms, recommended by the OECD/IMF as a solution to address the prevailing uncertainty related to TP transactions.

In the context of this thesis, this section serves as a cornerstone for elucidating the importance of *ex-ante* legal certainty in fostering investments and trade. It also highlights the vital role played by dispute avoidance mechanisms in enhancing *ex-ante* certainty. A comprehension of

the concept of dispute avoidance mechanism lays the groundwork for the subsequent Chapter, which explores how the EC has undermined the effectiveness of these dispute avoidance mechanism in providing *ex-ante* certainty. Consequently, this undermines the OECD/IMF's political prioritization of improving tax certainty.

2.2.2. The OECD/IMF Tax Certainty Agenda to Counteract Uncertainties that Affect investments

In 2016, the G20 leaders officially acknowledged that the current international framework is significantly affected by a notable level of tax uncertainty.[71] The primary motivation behind the G20 leaders' political action is to foster investment, with tax uncertainties being identified as a key factor influencing investments and trades. Responding to the G20's call, the OECD and the IMF initiated the "*tax certainty agenda*".[72] This agenda revolves around annual reports on tax certainty, which not only confirm the existence of tax uncertainty and its impact on economic growth and investment, but also propose practical measures to enhance tax certainty.[73]

The OECD's commitment to improving "*tax certainty*" is also evident in the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) actions.[74] For instance, the so-called "BEPS - *Pillar one*" seeks to enhance certainty by introducing "*dispute prevention and resolution mechanisms".*[75] Similarly, "BEPS - *Pillar two*" addresses implementation questions to improve tax certainty through consensus-based solutions and cooperation between tax administrations.[76] The OECD Forum on Tax Administration has been actively engaged in

[71] G20 'Communiqué of G20 Finance Ministers and Central Bank Governors', (2016) Meeting in Hangzhou, China, 4-5 September 2016. See also G20, 'Communiqué of G20 Finance Ministers and Central Bank Governors', (2017) Meeting in Baden-Baden, Germany, 17-18 March 2017. See also H.C. Holte and L. Angvik, 'Q&A: OECD FTA Head Priorities Tax Certainty', (2018) 29 Int'l Tax Rev. 28, 223.

[72] OECD/IMF, 'The OECD /IMF Report on Tax Certainty' (2017) G20 Meeting, March 2017, 62.

[73] Ibid IMF/OECD, 'IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors, Update on Tax Certainty', (2018); IMF/OECD, 'IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors', (2019) Progress Report on Tax Certainty.

[74] The BEPS package was designed to be implemented via subsequent inclusive actions. Addressing the tax challenges arising from the digitalisation of the economy has been one of the top priorities of the BEPS Project and the Inclusive Framework since 2015 with the release of the BEPS Action 1 Report. https://www.oecd.org/tax/beps/.

[75] In January 2019, the members of the Inclusive Framework agreed to examine proposals in two pillars that are the basis for a consensus solution to the tax challenges arising from digitalisation. "Pillar One" is focused on nexus and profit allocation whereas "Pillar Two" is focused on a global minimum tax intended to address remaining BEPS issues. The Blueprint of pillar one divided the tax certainty dimension into two segments: dispute prevention and resolution for amount A: and dispute prevention and resolution beyond amount A. See OECD 'Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS', OECD/G20 Base Erosion and Profit Shifting Project, (OECD Publishing, 2020), 7,10,15, and Chapter 9 "Tax Certainty", pp. 168-197.

[76] OECD, 'Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS', OECD/G20 Base Erosion and Profit Shifting Project, (OECD Publishing, 2020), 10.

efforts to improve tax certainty by fostering greater tax co-operation among tax administrations.[77]

In the initial reports, there was no formal definition of tax certainty.[78] It was only in subsequent reports that the G20 provided a positive definition, stating that tax certainty involves: "*the creation and maintenance of stable regulatory and policy frameworks for tax administration, taxpayers and tax compliance* [and] *a common framework of rules and procedural standards geared to create a level playing field and provide long-term conditions suitable for investment*".[79] According to Owens, tax certainty can be defined as "*the capacity to make an accurate assessment of the tax and compliance costs associated with an investment or a continuation of an investment in a country over the lifecycle of the investment/company*".[80]
These definitions highlight the two main aspects of tax certainty. First, tax certainty has a dual perspective, addressing the predictability of tax regimes and ensuring that taxpayers are appropriately taxed. [81] The OECD emphasizes that improving tax certainty is beneficial for both taxpayers and tax administrations. Second, both definitions underscore that the ultimate aim of tax certainty is to promote investments.[82] This alignment with the G20's political initiative reflects the shared goal of fostering investments.

In the International Bureau of Fiscal Documentation (IBFD) glossary, tax certainty is defined as follow: "*taxpayers should know exactly what is being taxed, how much he has to pay and how and when he has to pay it, meaning that the law should be clear and unambiguous and the tax authorities' interpretation of it should be readily available*".[83] This definition takes more a legal-oriented perspective (rather than economic-oriented), emphasizing that tax certainty is considered a taxpayer right rooted in the freedom to decide. Notably, the term "investment" is not explicitly mentioned in this definition.

From the legal standpoint, the focus is on the taxpayer's right to know, in advance, the effect of their actions. The core of this legal approach is not the direct impact on investments but

[77] OECD, Ibid. See also J.E. Colliard, L. Eden, and C.P. Georg, 'Tax Complexity, Tax Certainty, and the Pillar One and Two Blueprints', Public Consultation document on the Reports on Pillar One and Pillar Two Blueprints, December 14, 2020.
[78] OECD /IMF2017 (n. 76). IMF/OECD 2018 (n. 76); IMF/OECD 2019 (n. 76).
[79] G20(n. 75).
[80] J. Owens, 'The Role of Tax Certainty in Promoting Sustainable and Inclusive Growth', Multi-disciplinary Conference, UNCTAD, Geneva 26/10/2018. Our definition of tax certainty aims to stress this double perspective: "*Tax certainty is a feature of the tax system that ensure the outcome of tax liabilities for tax administration, taxpayers, and is designed to reduce the possible incidence of discretion by preventing tax avoidance without prejudice to compliance and investments".* This definition was presented during the 10th Doctoral Seminar on International and EU Tax Law at the University of Bergamo, 21st to 22nd of September 2020.
[81] G. Mourre, C. Astarita and A. Maftei, 'Measuring the Uncertainty in Predicting public revenue', European Commission, Publications Office of the European Union, 2016. The paper tries to analyse the predictability of revenue developments in the EU countries since the conduct of fiscal policy faces the usual difficulty of accurately predicting the various components of the budget, not least the amount of public revenue.
[82] OECD Tax Certainty Day, 16 September 2019, OECD Conference Center, broadcast event: https://oecdtv.webtv-solution.com/5829/or/tax_certainty_day.html, last accessed on 1st September 2021
[83] See the IBFD glossary: https://www.ibfd.org/IBFD-Tax-Portal/News/Quick-access-Tax-Glossary-terms. last accessed on 26 August 2021.

rather the principle that taxpayers have the right to act freely with knowledge of the consequence of their actions. In contrast, the G20, OECD, and the IMF reports suggest the idea of an *ex-ante* certainty, emphasizing the importance of reducing uncertainties before an investment takes place. *Ex-ante* certainty is seen as a viable way "*to promote investment and trade*", as uncertainties, especially those related to unpredictable "*unpredictable, discretionary or incoherent*" treatment by tax authorities, can deter investment and trades.[84]

Both the economic approach represented by the OECD/IMF and the legal approach from the IBFD converge on the idea that legal uncertainty is a primary factor influencing tax certainty. Tax certainty, as defined by OECD/IMF, is essentially negatively defined by its corresponding legal uncertainties.[85] Addressing and reducing these uncertainties are seen as essential steps toward improving tax certainty.

The Tax Certainty Report 2017 highlighted that, among various legal uncertainties, "*the overall tax environment*" was ranked as the third most critical factor after corruption and political certainty. Specific tax factors "*related to tax administration*", such as gaps *"between the tax legislation and its application*", and the "*discretionary and incoherent application of tax rules*" were identified as primary drivers of uncertainty in tax systems.[86]
Surveys, including those conducted by the Oxford University Centre for Business Taxation, consistently found that the most critical factor contributing to uncertainty is the "*unpredictable or inconsistent treatment by tax authority*".[87] Both taxpayers and tax administrations acknowledged that "*legislative uncertainty*" and political design are the principal factors affecting tax certainty. [88] Additionally, taxpayers expressed concerns about policy implementation and inconsistencies in the actions of tax administrations, further contributing to uncertainty in the tax landscape.[89]

Statistical reports and analyses highlight that, among various legal tax issues, TP is particularly affected by the uncertainties in the current legal framework, especially in the post-BEPS era.[90] TP rules, from their early stages, have been marked by uncertainties related to their wording, scope and different economic appraisals that have been generated by a multitude of court judgments.[91]

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[84] OECD /IMF (n. 76).
[85] The following factors are listed as the main categories of sources of tax uncertainty: policy design and legislative uncertainty, policy implementation and administrative uncertainty, uncertainty around dispute resolution mechanisms, uncertainty arising from changes in business and technology, taxpayer conduct can contribute significantly to uncertainty. See OECD /IMF2017 (n. 76). IMF/OECD 2018 (n. 76); IMF/OECD 2019 (n. 76).
[86] The OECD /IMF 2017, (n. 76), 20.
[87] M. P. Devereux, 'Measuring Corporation Tax Uncertainty across Countries: Evidence from a Cross-Country Survey', Oxford University Centre for Business Taxation, European Tax Policy Forum, 2016.
[88] See J. Schwarz, 'Tax Certainty: Cure the Disease not the Symptom', Kluwer International Tax Blog, http://kluwertaxblog.com/2018/08/28/tax-certainty-cure-disease-not-symptom/ last accessed on 15.01.2021.
[89] OECD /IMF 2017 (n. 76), 25.
[90] OECD /IMF 2017, ibid. See also Ernst & Young Global Transfer Pricing Survey, 2005-2006, 2007-2008, 2010, 2016, 2019.
[91] Seidman (n. 8), vii*;* The Senate Finance Committee has expressed the "equivocal language" of the text in several congress by connecting the unclearness of concepts with the legal aspects of the adjustment procedures. See Senate Finance Committee, 65th,67th Cong., first session.

In the contemporary landscape, the role of MNEs in global trade has expanded, and TP has emerged as one of the most critical tax issue on a global scale.[92] Numerous surveys and pieces of literature emphasize that TP is arguably the most significant source of uncertainty in modern international taxation, particularly from the perspective of tax law uncertainty.[93] The 2019 Tax Certainty Report from the OECD and IMF specifically notes that the interpretation and application of TP rules can be a significant source of uncertainty in tax matters, leading to international tax disputes.[94]

This thesis serves as a continuation of the G20's political objective to enhance tax certainty but with a specific focus on the EU legal landscape. Prior to delving into how the EU legal certainty principle can contribute to achieving the G20's goals, it is essential to comprehend the economic approach outlined by the OECD/IMF and their conception of tax certainty. This understanding forms the foundational groundwork for examining hot the EU legal certainty principle can be a feasible solution to pursue the G20's political objective. Given that TP has been identified as a primary source of uncertainty, this thesis is centered (and it is limited) on the improvement of tax certainty in TP transactions within the EU, particularly within the State aid law framework. Subsequent sub-section will elaborate on the fundamentals of TP rules, and specific aspects of TP will be defined in greater detail as the analysis progresses in the thesis.

2.2.3. Transfer Pricing: One of the Main Source of Tax Uncertainty

The uncertainties associated with TP transactions have been a longstanding issue, with roots tracing back to the early 20th century. In the United Kingdom, legal uncertainties in TP rules emerged in 1915 with enactment of the UK Finance Act,[95] and subsequently, the United States introduced the War Revenue Act in 1917, and the Fiscal Act in 1921, leading to numerous legal disputes.[96]

This thesis places a particular emphasis on the legal uncertainties surrounding TP transactions, as evidenced by the EC's initiation of State aid investigations into TP transactions covered by rulings.[97] TP, in broad sense, refers to the pricing of cross-border intra-firm transactions

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[92] OCSE, *Globalisation of Industry*, 1996.

[93] Y. Givati, 'Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings', (2009) The Harvard John M. Olin Fellow's Discussion Paper Series: Discussion Paper No. 30, 6/2009. Ernst & Young's third survey instalment, Tax authority Interviews: Perspectives, Interpretations, and Most Important Regulatory Changes, E&Y, 'Ernst & Young's Transfer Pricing Regional and Industry Trends, Practices, and Analysis', Quarter 2, 2006; Ernst & Young, 2007-2008 Global Transfer Pricing Survey; Ernst Young, 2010 Global Transfer Pricing Survey, Addressing the Challenges of Globalisation, 2010; Ernst & Young, 'Navigating the Choppy Waters of International Tax', Global Transfer Pricing Survey, 2013; Ernst & Young, 2016-17 Transfer Pricing Survey Series, 'Controversy Avoidance and Resolution', 2016-17; Ernst & Young, 'How Profound Change, Transparency and Controversy are Reshaping a Critical Business Function', Transfer Pricing and International Tax Survey, 2019.

[94] OECD/IMF 2019, Tax Certainty Report (n. 76), 16.

[95] UK Finance Act, Chapter 89, Part II, Income Tax, sec. 31(3).

[96] US War Revenue Act, sec. 208, War Excess Profits Tax, 1917.

[97] See Cpt. 2.2.4.

involving associated parties.[98] Unlike transactions in an open market, intra-group prices in TP transactions can be manipulated by the controlling entity, which control the associated enterprises.[99]
The thesis further explores TP regimes, emphasizing their role in preventing MNEs from shifting profits between entities subject to different varying taxation levels, thereby by reducing the group's overall tax burden.[100] TP regimes teat each entity within the group separately (the so-called single entity approach), to calculate the taxable profit for each company.[101]

The purpose of TP rules, particularly as outlined in Art.9 of the OECD Model Tax Convention (MTC), have been subject to interpretation and debate within the academic and practitioner communities.[102] Art. 9 of the OECD MTC: "*associated enterprises*", forms the main legal basis for TP rules.[103] The wording of Art.9 allows for the adjustment of profits, but notably, the term "price" does not explicitly appear in the Article..[104] The Article's position between the distributive Articles of the OECD MTC, as well as its relationship to Arts 7(1) and 8, has led to discussions about its purpose, with some suggesting that it aims to prevent double taxation.[105]
The question of whetherArt. 9 OECD MTC has an anti-avoidance purpose is a matter of contention. Pogorelova has argued that anti-avoidance is both an implicit and explicit purpose of a treaty, asserting that Article 9, along with the arm's length standard and TP Guidelines, serves anti-abuse functions.[106] Scholars like Vogel and Prokisch propose that the "*substance over form*" principle, acting as a general anti-abuse provision, is implicitly embedded in double-tax treaties.[107] Other several scholars support the same position.[108] Other tax experts object

[98] United Nations, 'Practical Manual on Transfer Pricing for Developing Countries', (2017), para 1.1.6. See also OECD Glossary of Statistical Terms: "*A transfer price is a price, adopted for bookkeeping purposes, which is used to value transactions between affiliated enterprises integrated under the same management at artificially high or low levels in order to effect an unspecified income payment or capital transfer between those enterprises*" - https://stats.oecd.org/glossary/detail.asp?ID=2757; last accessed on 24 Aprile 2021.
[99] M. Lang, *Introduction to the Law of Double Taxation Conventions*, (IBFD 2013), 146.
[100] A. Steichen, Prècis de Droit Fiscal de l'Entreprise, Legitech, 2020.
[101] H. Luckhaupt, M. Overesch and U. Schreiber, 'The OECD Approach to Transfer Pricing: A Critical Assessment and Proposal', in W. Schön and K. Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics*. (Springer, 2018), 91-121. See also R. Vann, 'Taxing International Business Income: Hard-Boiled Wonderland and the End of the World', (2010) 2 World Tax Journal291,306.
[102] P. Baker, *Double Taxation Conventions* (Sweet &Maxwell, 2001), para. 9B.01.
[103] OECD, 'Model Tax Convention on Income and on Capital: Condensed Version 2017', (OECD Publishing, 2017), https://doi.org/10.1787/mtc_cond-2017 34. See also UN, 'UN Model Double Taxation Convention, between Developed and Developing Countries', (2017), 18.
[104] A. Bullen, 'Arm's Length Transaction Structures: Recognizing and Restructuring Controlled Transactions in Transfer Pricing', (IBFD Doctoral Series Book 20, 2018).
[105] B. Mitchell, 'Carroll Prize', (1968), International Lawyer 129; C. Rotunda, 'The Notion of 'Associated Enterprise: Treaty Issues and Domestic Interpretation – An Overview', (2000), International Transfer Pricing Journal 1 2.
[106] L. Pogorelova, Transfer pricing and anti-abuse rules, Intertax, Volume 37, Issue 12, 2009.
[107] Klaus Vogel & Rainer G. Prokisch, 'General Report', Cahiers de Droit Fiscal International 78a (1993): 55–85, p.72.
108 A. Rust, Germany, in Tax Treaties and Domestic Law, ed. Guglielmo Maisto (Amsterdam: IBFD); D. Ward Q.C.(Chairman), How Domestic Anti-Avoidance Rules Affect Double Taxation Conventions, Proceedings of a Seminar held in Toronto, Canada, in 1994 during the 48th Congress of the International Fiscal Association, vol. 19c (The Hague: Kluwer Law International, 1995), p. 12.

the general anti-abuse purpose since Art.9 is a specific article having not a general scope.[109] Others pointed out that tax treaties ordinarily restrict taxing rights of contracting states and the arm's length standard has the main purpose of allocating taxing right.[110] The OECD TP guidelines (OECD TPG) takes into consideration both functions: the primary function of allocation of taxing right and the subsidiary function of anti-tax avoidance when tax avoidance arises. A look through OECD TPG gave us these double purposes: "*the consideration* of TP should not be confused with the consideration of problems of tax fraud or tax avoidance, even though TP policies *may be used for such purposes*".[111] but "*there could be tax avoidance to the extent that the components of the relevant formula can be manipulated*"[112]. The OECD TPG further introduce the concept of secondary adjustments, which "*may serve to prevent tax avoidance*" in case where the subjecting to tax of a secondary transaction gives rise to a secondary TP adjustment.[113]

This reflects the multifaceted nature of TP rules, addressing both the primary function of allocating taxing rights and the subsidiary function of anti-tax avoidance when needed. Luja supports the idea that TP adjustments can serve an anti-abuse function, preventing scenario of "*too low*" taxation, or double non-taxation.[114]

Haslehner has identified several potential purpose of TP rules, including: (i) the anti-abuse function to protect the consistency and integrity of a tax system, (ii) the purpose of avoiding arbitrary profit-shifting between members of MNE, (iii) the inter-jurisdictional equity to ensure the balanced allocation of tax revenues among sovereign states, (vi) the protection of the taxpayers against over taxation.[115] The existence of these multiple purposes adds to the complexity and potential for divergent interpretations, creating uncertainty within the application of TP rules.

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[109] M. Petriccione, 'Anti-avoidance Provisions in Tax Treaties', ITPA Journal 9, no. 3 (2009): 101-113, at 102 and 105. See also Vogel & Prokisch, supra n. 2, p. 73.

[110] L.E. Schoueri, (2015) Arm's length: beyond the guidelines of the OECD. Bull Int Taxation 69.

[111] OECD (2022), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris, para 1.

[112] OECD (2022), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris, para 1.3.

[113] OECD (2022), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris, p.33, para 1.23 p.40, para 4.68 p.196).

[114] R. Luja, EU State Aid Law and National Tax Rulings (EU Parliament Paper IP/A/TAXE/2015-02) p.13.

[115] W. Haslehner, 'Transfer Pricing Rules and State Aid Law', in C. HJI Panayi, W. Haslehner and E. Traversa (eds) *Research Handbook on European Union Tax Law*„ (Edward Elgar 2020), 430-450; See also W. Schön, 'Transfer Pricing – Business Incentives, International Taxation and Corporate Law', in Wolfgang Schön and Kai Konrad (eds) *Fundamentals of International Transfer Pricing in Law and Economics* (Springer 2012), 48. Lang specified that Art. 9 OECD Model is not formally an allocation rule but has a special role since it has confining functions similar to that of allocation rules. M. Lang, *Introduction to the Law of Double Taxation Conventions*, (IBFD 2013), 146. About the purpose of preventing tax avoidance, see para. 41 of the Introduction to the OECD Model; para. 7 of the Commentary on Art. 1. Previously in the 2003 version, the Commentary on Art. 1 did not refer to the prevention of tax avoidance as an aim of the Model, although para. 7 of the Commentary on Art. 1 cited that tax treaties should not help tax avoidance. See Brian J. Arnold, 'Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model', (2004) Bulletin for International Fiscal Documentation 6,244 and Stef Van Weeghel, *The Improper Use of Tax Treaties* ([PUBLISHER, 1998), 34. Although it has been argued that the purpose of article 9(1) is to prevent tax avoidance, some authors reject this interpretation. See *inter alia* J. Wittendorff, 'The Transactional ghost of Article 9(1) of the OECD Model', (2009) Bulletin for International Taxation, 445.

Uncertainties inherent in TP rules do not involve only their purpose but also the different interpretation of law provisions. Different tax authorities may interpret and apply the same provisions differently, leading to inconsistencies and disputes. This is a significant source of risk for MNEs. This is a significant source of risk for MNEs, as evidenced by the following surveys indicating that TP is considered a leading source of risk. For example, the EY Global TP Survey in 2013 found that 66% of companies identified risk management as their top TP priority.[116] A "*right*" compliant price is challenging to achieve. That is why the difficult compliance is correlated to the high risk of disputes. The OECD/IMF Report in 2017 acknowledged that business do not necessarily seek absolute certainty in tax matters but rather an environment where they can manage the risks associated with tax uncertainty, as reported by the following sentence that links the concept of uncertainty with the risks and compliance: "*their decisions do not need absolute certainty in tax matters but an environment where they are able to manage the risk associated with tax uncertainty*."[117] In essence, a high level of uncertainty is correlated with an elevated risk of disputes, emphasizing the importance of effective risk management in TP.

The core of TP uncertainties lies in the application of the arm's length standards. [118] To curb artificial TP practices by MNEs, governments have adopted the arm's length standard, articulated in para 1 of Article 9 of the OECD MTC.[119] The OECD TPG support the idea that "*A major reason is that the arm's length principle provides broad parity of tax treatment for members of MNE groups and independent enterprises. Because the arm's length principle puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity*". Under the separate legal entity approach, TP rules allocate the income from related party transactions,[120] requiring individual group members to be taxed as if they were acting at the conditions of normal market conditions between independent enterprises.[121] The arm's length standard dictates that conditions between associated enterprises must be comparable to those between independent enterprises, necessitating a comparability analysis considering functions performed, assets used and risks assumed.[122] Despite the broad recognition of the arm's length as a standard, determining the "right" price for a transaction often leads to divergent opinions between

[116] Ernest and Young 2013 (n. 93).
[117] OECD /IMF 2017(n. 76), 11.
[118] OECD Transfer Pricing Guidelines 2022 (n. 11).
[119] OECD Transfer Pricing Guidelines 2022 (n. 11).
[120] Schön (n. 107) 48.
[121] Klaus Vogel, Klaus Vogel on Double Taxation Conventions 555 (Ekkehart Reiner & Alexander Rust eds, 4th ed., Wolters Kluwer 2015).
[122] W. Schön, K. A. Konrad (Ed), Fundamentals of International Transfer Pricing in Law and Economics, Springer, 2012, p.137.

taxpayers and the tax authorities of different contracting states.[123] This difficulty in appraisal can result in numerous disputes, adding to the challenges faced by MNEs.[124]

In response to these challenges, the OECD has advocate for dispute avoidance mechanism as a solution to foster investment and trade.[125] These mechanisms aim to manage complexities of determining arm's length condition *ex-ante,* anticipating potential conflicts between tax authorities and taxpayers. By providing *ex-ante* certainty, these legal instruments are designed to enhance tax certainty, a crucial factor for investment decisions where time is of the essence. The effectiveness of dispute avoidance mechanisms lies in their ability to protect taxpayers from potential adversarial disputes that might arise *ex-post*.

2.2.4. Dispute Avoidance Mechanism as the Suggested Solution to Provide Early Certainty

As mentioned in the previous sub-Chapter, dispute avoidance mechanisms are key elements in the OECD/IMF strategy to foster investment and minimize the risk of tax disputes by providing early certainty.[126] The most known dispute avoidance mechanisms include (i) tax rulings, (ii) exchange of information, (iii) joint audit and simultaneous tax examination, and (iv) safe harbours.[127]

It's crucial to distinguish dispute avoidance mechanisms from dispute resolution instruments like Mutual Agreement Procedures (MAP).[128] Dispute resolution mechanisms come into play after a dispute has arisen, aiming to address situations where international tax disputes have already occurred. On the other hand, dispute avoidance mechanisms anticipate potential conflicts and seek to resolve issues before they arise. The first OECD report on tax certainty emphasized that dispute resolution mechanisms can themselves be a "*main source of uncertainty*"

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[123] E. King, Transfer Pricing and Corporate Taxation, Problems, Practical Implications and Proposed Solutions, p.183.
[124] K.S. Mansori and A.J. Weichenrieder, 'Tax Competition and Transfer Pricing Disputes', (2001) Finanz Archiv/Public Analysis. E. Baistrocchi, and I. Roxan, Resolving Transfer Pricing Disputes: A Global Analysis, (CUP, 2012). G. Campos, 'Treaty Provision for the Arbitration of Transfer Pricing Disputes', (1996) 10 Intertax 370-4.
[125] M. Diller, P. Kortebusch, G. Schneider and C. Sureth-Sloane, 'Boon or Bane? Advance Tax Rulings as a Measure to Mitigate Tax Uncertainty and Foster Investment' (2016), 26(3) European Accounting Review 441-468.
[126] Cf 2.2.3. See also OECD /IMF 2017 (n. 76).
[127] S. Buriak, 'Administrative Approaches to Avoiding/Minimizing Transfer Pricing Disputes', in R. Petruzzi, G. Cottani, M. Lang, *Fundamental of Transfer Pricing, A Practical Guide*, (Wolters Kluwer, 2019), 161.
[128] Art. 25 of the OECD Model Tax Convention provides a dispute resolution mechanism, independent from the ordinary legal remedies available under domestic law, through which the competent authorities of the Contracting States may resolve differences regarding the interpretation or application of the Convention on a mutually-agreed basis. Moreover, one of the measures developed under Action 14 of the BEPS Action Plan aim to strengthen the effectiveness and efficiency of the MAP process. They aim to minimize the risks of uncertainty and unintended double taxation by ensuring the consistent and proper implementation of tax treaties. See OECD/G20 Base Erosion and Profit Shifting Project, 'Making Dispute Resolution Mechanism More Effective', Action 14: 2015 Final Report. See also European Commission, 'Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union', COM (2016) 686 final and Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the EU.

due to their often-lengthy processes, leaving businesses in an uncertain tax position for extended periods.[129]

It is now clear that time is a critical factor in the context of tax certainty and its impact on investments.[130] The timeline outlined presents different phases of tax certainty: a) early certainty provided by dispute avoidance mechanisms, b) *ex-post* certainty (within an average time of thirty months) provided by the mutual resolution process,[131] and c) the *ex-post* certainty provided by the judicial review of the tax position. This latter situation covers also the legal protection provided by the legal principles (such as the legal certainty principle), which will be covered in the upcoming section of this Chapter. For the scope of this section, it is sufficient to clarify that the *ex-post* certainty provided by MAP and judicial review is less relevant for investments compared to the *ex-ante* possibility to reduce uncertainty provided by the dispute avoidance mechanisms.[132]

Among all the dispute avoidance mechanisms, advance pricing arrangement (APA) and tax ruling are recognised as the most efficient legal instrument to provide early certainty.[133] An APA is defined as an arrangement between the taxpayer and the tax administration that determines, in advance of controlled TP transactions,[134] appropriate criteria (e.g. transfer pricing method, adjustments, comparables) for determining the price for those transactions over a specified period.[135] It is a legal instrument through which the result of applying the arm's length standard to a particular transaction or set of transactions (referred as to "*covered transactions*") can be predetermined in agreement with the taxpayer.[136] Although APAs promote tax certainty, they differ from safe harbours.[137] APAs are also distinct from tax rulings, although they work very similarly.[138] Tax rulings are considered a macro-category that includes

[129] OECD /IMF 2017 (n. 76), 22.
[130] Lund (n. 5)
[131] See the OECD Mutual Agreement Procedure Statistics for 2019, https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm.
[132] The *ex-ante* possibility of have tax certainty is relevant since other form of certainty are provide when the investment decision is irreversible. On the contrary the dispute avoidance mechanisms provide an ex-ante certainty before the irreversibility of the decision-maker: See A. Dixit and R. Pindyck, *A New View of Investment*, (Princeton University Press, 1994). See also Y. Feldman Sn and S. Lifshitz, 'Behind the Veil of Legal Uncertainty, Law and Contemporary Problems', (2011), 74 Law and Contemporary Problems 133,.133. See the opposite point of view A. Givati, 'Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Price Tax Rulings', (2009) 29 Virginia Tax Review 137-175, 142.
[133] P. Kortebusch, 'Should Multinational Companies Request an Advance Pricing Agreement (APA) or Shouldn't They?' (2014) Paper 173, WP. M. Markham, 'The Advantages and Disadvantages of Using an Advance Pricing Agreement: Lessons for the UK from the US and Australian Experience', (2018) Intertax, Vol. 33, Issue 5, 542.
[134] Also called "*covered transaction*". See UN, 'Practical Manual on Transfer Pricing for Developing Countries', (2017), B.1.7.11, 52.
[135] OECD Transfer Pricing Guidelines 2022 4.134, 214. See also EU Joint Transfer Pricing Forum Guidelines for Advance Pricing Agreements within the EU, Annex para 2.
[136] UN Practical Manual (n. 123) B.1.7.11., 52, and C.1.3.2.3., 391.
[137] Safe harbors are other dispute avoidance mechanisms. See *OECD TP Guidelines 2022*, cpt.4.
[138] Tax rulings as a need to "obtain reliable information concerning "*the application of tax laws which is a prerequisite for all financial planning"* and the indeterminacy of the actual legal scenario *"constitutes a serious problem of legal security"* was one of the main topics discussed since the 19th Congress of the International Fiscal Association (IFA) in London in 1966. See : International Fiscal Association, *Cahiers de droit fiscal international*, (Kluwer 1965). See also 34th Congress in Paris in 1980; See International Fiscal Association, 'The Dialogue between the Tax Administration and the Taxpayer up to the Filing of the Tax Return', in International Fiscal Association, *Cahiers de droit fiscal international*, (Kluwer 1980). M. Ellis, 'General

APAs. As a macro-category, tax rulings encompass tax arrangements that can involve agreements, contracts, arrangements, compromises, a unilateral administrative decision, advance tax rulings, settlements and a commitment promise.[139] The key distinction between APAs and tax rulings lies in the fact that the latter can be granted on any tax issue and usually pertain only to a particular transaction. APAs, on the other hand, relate specifically to the application of TP regulations, covering one or several types of transactions.[140] Tax rulings are typically limited to questions of legal nature based on facts declared by a taxpayer, whereas APAs are factual-oriented, and therefore, facts are integral to the tax administration's assessment.[141] APAs can be binding legal instruments or informal arrangements depending on the legal forms adopted by the country.[142] They could be unilateral, bilateral or multilateral. Unilateral APAs occur when the tax administration and a taxpayer establish an arrangement in its jurisdiction without the involving other interested tax administrations.[143] Bilateral and Multilateral APAs, referred as "*MAP APAs*", involve a mutual agreement negotiated between the taxpayer and two or more tax administrations.[144] Concerning tax certainty, the OECD and UN guidelines encourage bilateral and multilateral arrangements through the MAP procedure since they have the ability to reduce the risk of double taxation.[145] Action 14 of the BEPS recommends the implementation of bilateral APAs as non-binding best practice in order to ensure the timely, effective, and efficient resolution of treaty-related disputes. This helps provide a greater level of certainty in both treaty partner jurisdictions, lessen the likelihood of double taxation, and may proactively prevent TP disputes.[146]

In summary, the international community has recognized that tax uncertainty is a current global issue, particularly for cross-border investments and trades. Among all tax uncertainties, TP rules are considered the most problematic due to the challenging assessment required to calculate prices under market conditions. However, OECD/IMF has identified dispute avoidance mechanisms as the most effective tool for reconciling taxpayer rights to certainty with the need of for investments and trades. Since this thesis is focused to improve tax certainty within the EU law framework, the next section aims to recap how the EU institutions are able to improve tax certainty.

Report in Advance Rulings', in IFA, *Cahiers de droit fiscal international*, Vol. LXXXIVb, (Kluwer,1999); J.M. Rivier et al., 'Advance Ruling: Practice and Legality', (1994) Proceedings of a Seminar held in Cancún, Mexico, in 1992 during the 46th Congress of the International Fiscal Association, Kluwer, 1994.

[139] European Parliament, Directorate-General for Internal Policies, Policy Department, Economic and Monetary affairs, 'Tax Rulings in the EU Member States', Study of the ECON Committee, 2015, 26.

[140] UN, Practical Manual (n. 123), C.1.3.2.5., 392.

[141] *OECD TP Guidelines 2022* (cpt.2).

[142] UN Practical Manual (n. 123) C.1.3.2.3., 391.

[143] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (F), F1.

[144] In residual cases, where a bilateral APA has been sought and the treaty is not appropriate, or where a treaty is not applicable, the competent authorities of some countries may nevertheless conclude an arrangement using the executive power conferred on the heads of tax authorities. See OECD (Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (n. 11) Annex II to Chapter IV, A2, 472.

[145] OECD ibid4.173, 225. See also UN Practical Manual (n. 123) B.1.7.11, 52.

[146] OECD (2015) (n. 115), para 48, 30.

2.2.5. The EU "Tax Certainty" and the Uncertainties Peculiar to EU Law Framework

The awareness of the current status of tax uncertainty has also been taken into consideration at EU level. "*EU taxation paper 67*" is a recent study conducted by the Directorate of the EC, emphasizing the role and the effect on uncertainties on the tax framework.[147] In coherence with the OECD/IMF Report, the EU taxation paper focuses on identifying the relevant uncertainties affecting the tax system, which can arise from various sources at both the domestic and international levels.
Internationally, the primary reasons for increased tax uncertainty include the "*lack of tax coordination*" between countries, globalisation, and new business models. At the domestic level, key sources of tax uncertainty involve the "*lack of precision*" of the tax codes, conflicting provisions and interpretations over time, and frequent changes to tax.[148] The EU Taxation Paper 67 highlights that at the EU level, the fragmentation of the EU system into 28 national systems is an additional source of uncertainty for cross-border investments.

Tax certainty has become central to the work of the *Confédération Fiscale Européenne* (CFE).[149] In its Opinion Statement on tax certainty, the CFE acknowledges the current lack of tax certainty and firmly supports the idea that "*tax certainty must become a priority of policymakers*".[150] Similar to the IMF/OECD and EC, the CFE initiates its analysis by identifying the relevant uncertainties. The primary source of uncertainty identified is "*unclear laws*" or "*unclear interpretation of the laws*". This lack of clarity undermines all freedom of taxpayers as they are unable to make informed decisions about the consequences of their investments and the associated risks.
Reducing the ambiguity in laws not only benefits taxpayers by providing more clarity but also results in decreased compliance costs and a "*decrease of the risk of dispute*". Simple and straightforward rules leave less room for ambiguous interpretations and, consequently, for disputes. The CFE does take an extreme position advocating for the immutability of laws or complete and absolute certainty. Instead, their proposal acknowledges that some amendments to laws may be necessary.[151] This balance entails preserving clarity and uniformity in laws, avoiding retrospective legislation, and limiting retroactive legislation, aligning with the principles outlined in the EU taxation paper 67.[152]

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[147] European Commission's Directorate-General for Taxation and Customs Union, 'Tax Uncertainty: Economic Evidence and Policy Responses', (2017) Taxation Paper n. 67/2017.
[148] Ibid10.
[149] The CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, representing more than 200,000 tax advisers. CFE is part of the European Union Transparency Register no. 3543183647-05. Its functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.
[150] CFE, Opinion Statement FC 7/2017 on Tax Certainty, prepared by the CFE Fiscal Committee, Submitted to the European Institutions on 20 November 2017, 2.
[151] In the Presentation to the member of the Platform for Tax Good Governance, "*Towards greater fairness in taxation, A Model of Taxpayer Charter*", CFE used the term "*dilemma*" to express the apparent unsolvable issue between the protection of the revenue of tax administration and the risk for taxpayers.
[152] The CFE provides both definitions: "*Retrospective legislation operates on subject matter taking place prior to the enactment (e.g. penalizing conduct that was lawful when it occurred) whereas retroactive legislation operates prospectively to change the law in relation to subject matter which was until that point in time legal*". See CFE, Opinion Statement (n. 139)4. See, *inter alia*, Case 63/83, *Regina v Kent*

When CFE discusses uncertainties, it employs the terms "*tax certainty*" or "*tax uncertainty*". However, when highlighting the benefits of tax certainty, it uses the term "*legal certainty*". One possible explanation is that the CFE perceives tax certainty and its advantages as a form of taxpayer protection. This legally-oriented perspective aligns closely with the IBFD definition of tax certainty.[153]The legal certainty principle, applicable to tax law, serves as a legal foundation to safeguard taxpayers, particularly when the lack of clarity in the law undermines the freedom of taxpayer.[154] When CFE puts forth solutions for taxpayer protection based on the Model Taxpayer Charter, the term 'legal certainty' is replaced by the "*taxpayers' fundamental right to tax certainty*", rather than the "*fundamental right of legal certainty*".[155] As explained in the preceding section, tax certainty is a comprehensive concept encompassing not only the right to certainty for taxpayers but also the "*certainty to tax*" for tax administrations..[156] The use of the term "tax certainty" is consistent with this balance between taxpayer's rights and responsibilities towards tax authorities. . In harmony with the CFE Model Taxpayer Charter, the OECD Model of Taxpayers' Charter similarly formulates the same balance between the "*right to certainty*" (among other rights) and "*taxpayer's basic obligations*".[157] This underscores the shared understanding that tax certainty involves a reciprocal relationship, acknowledging both the entitlement of taxpayers and their corresponding obligations to tax administration.

In the Opinion Statement on European Tax Advisers' Policy Priorities for the EU Mandate 2019-2024, the CFE affirms that "*taxpayers rights and tax certainty*" must be a priority for EU policymakers.[158] The CFE strongly supports the OECD's proposals to increase the level of tax certainty and strengthened taxpayer rights. To protect the rights of both taxpayers and tax administrations, the CFE advocates for the establishment of mandatory obligations for both parties. Consistent with the IMF/OECD, the CFE endorses the idea that "*advance certainty for taxpayers*" is a best practice (better than ex-post certainty such as dispute resolution procedure). This advance certainty should be established through "*cooperative compliance programs and tax rulings practices*".[159] *Ex-ante* tax certainty provided through tax rulings and APAs has proved to

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Kirk [1984] ECR 2689, para 21, and Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023, para 45. See also, D. Popovic and Svetislav V. Kostic, 'Legal Certainty and Taxation: The Problem of Retroactive Interpretation', (2018) Annals Fac. L. Belgrade Int'l Ed. 38.

[153] Cf:2.2.2.

[154] H. Gribnau, Equality, Legal Certainty and Tax Legislation in the Netherlands, Fundamental Legal Principles as Checks on Legislative Power: A Case Study (2013), Utrecht Law Review, 9(2), 52–74, 58. T. Nagel, *Equality and Partiality*, (Oxford University Press, 1991), 149.

[155] CFE, Opinion Statement (n. 139)

[156] CFE, AOTCA, STEP*, A Model Taxpayer Charter*, 2016, Art. 1(1), (3), and Art. 4(2). According to Art. 3, the persons covered by the Charter include both taxpayers, tax administrations.

[157] OECD, 'Taxpayers' Rights and Obligations', Practice Note, OECD Committee of Fiscal Affairs Forum on Tax Administration, (OECD Publications, 2003)3, 4: "*Taxpayers also have a right to a high degree of certainty as to the tax consequences of their actions. Of course, certainty is not always possible. For example, taxpayers may not always know in advance the effect of rules that are dependent on the facts and circumstances in a particular case. Also, tax authorities may not be obligated to provide the taxpayer with certainty in relation to the application of anti-abuse provisions aimed at taxpayers seeking to circumvent the intent of the legislation. However, it is clearly a goal that taxpayers should be able to anticipate the consequences of their ordinary personal and business affairs. Achieving this goal is often difficult because modern tax systems are complex and evolving*".

[158] CFE, Opinion Statement on European Tax Advisers' Policy Priorities for the EU Mandate 2019-2024, Submitted to the European Institutions on 12 July 2019.

[159] Ibid.

be "*an effective tool for the prevention of tax-related disputes, especially with respect to transfer pricing issues*". These tools offer certainty to taxpayers in planning for the future, and help "*prevent[ing] the risk of subsequent disputes*". The CFE proposes that "*EU should harmonize measures that would outline an EU framework of tax rulings*".[160] Similarly, the EU Joint Transfer Pricing Forum (hereinafter JTPF) has published a document on dispute avoidance, stating that "*tax administrations [by agreeing on APAs] should ensure that they are able to provide this certainty*".[161]
From the aforementioned documents, it is evident that the EU institutions and organisations, including the EC, CFE, and JTPF, share the same perspective as the G20 and the OECD: tax uncertainty is a current issue, and TP transactions are particularly affected. They also converge on the solution, advocating for dispute avoidance mechanisms as the most suitable instrument to provide early tax certainty.

2.2.6. Partial Conclusion

The uncertainty in tax law is affecting both investments and taxpayers' rights. Among the different facets of tax uncertainty, transactions involving TP present a specific challenge due to the complex task of determining the "correct" prices. Recognizing this challenge, global entities such as the G20, the IMF/OECD on a global scale, and the EC and CFE in Europe have prioritized tax certainty. They propose that implementing dispute avoidance mechanisms is the most effective strategy to provide early certainty and enhance investments and trade. This unified perspective underscores the importance of addressing tax uncertainty, particularly in the context of TP transactions, and highlights the global and regional efforts to establish mechanisms that foster clarity and stability in the tax environment.

2.3. Legal Certainty: A General Principle to Limit Law Uncertainties

2.3.1. Introduction

The legal certainty principle has provided guidance to lawmakers and judges for centuries. [162] Despite its historical significance, the question of its resolution remains open. While the IMF, OECD, and EC along with the CFE emphasize tax certainty as crucial for improving

[160] Ibid.
[161] EU JTPF (n. 124) Annex para 46. The EU Joint Transfer Pricing Forum (JTPF) is a forum composed of member states and business representatives who assists and advises the European Commission on transfer pricing tax matters. See https://taxation-customs.ec.europa.eu/joint-transfer-pricing-forum_en.
[162] J. Braithwaite, A.J.L. Phil, 'Rules and Principles: A Theory of Legal Certainty', (2002) Austl. J. Leg. Phil 27.

investments and trade, [163] it raises the question of whether this proposed tax certainty aligns with the legal certainty principle. [164]

In this section, we will answer this question starting delving into the historical quest for legal certainty and compare it to the IMF/OECD/CFE's concept of tax certainty. We will examine the similarities and differences between these two concepts, exploring whether legal certainty can serve as a solution to achieving the G20's goal of enhancing investment and trade.

This section will also clarify the relationship between legal and economic objectives, examining how dispute avoidance mechanisms can reconcile the two. Considering the EC's State aid investigations challenging the use of dispute avoidance mechanisms to provide early certainty and the non-recognition of protection from recovery based on the legal certainty principle, this section aims to establish a foundation for understanding the connection between legal certainty and investment, as well as the role it can play in protecting taxpayers' rights *ex-post*.

2.3.2. Legal Uncertainty: An Unresolved Issue

The proposal of an "tax certainty agenda" by the OECD/IMF's may suggest that the uncertainty in tax law is a contemporary issue. However, the notion of legal certainty in law has been a matter of debate throughout history, particularly in the field of taxation.[165] The concept of desired "*ius certum"* has been contentious since Roman law, [166] reflecting a continuous effort to clarify legal content through the application of logic and rationality. which was labelled as *certitudo iurisprudentiae*.[167] Since that period, discussions on legal certainty have unfolded in a diverse range of studies, encompassing works published in various languages

[163] See:2.2.

[164]OECD Tax Certainty Day, 16th September 2019, OECD Conference Center, https://www.oecd.org/tax/administration/oecd-tax-certainty-day.htm;

[165] G.T. Pagone, 'Tax Uncertainty', (2009) 33 MELB.U.L. Rev. 886.

[166] The famous story of the *decemviri* and the struggle for the rule of law in Rome was told by Livy in the third book of his *History* (*Ab urbe condita* III. 33ff). For similar developments in Athens, *see* Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley, 1986). A von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What has been Done, What can be Done' (2014) 51 CML Rev 59, 62.

[167] I. Birocchi, Alla Ricerca dell'Ordine, Fonti *e cultura giuridica nell'età moderna*, (Giappichelli, 2002), 159. Marcus Tullius Cicero, *De re publica* III.xxii.33. See also the concept of "imperium legum" in Titus Livius, *Ab urbe condita*, 2.I.I.

such as English,[168] Italian,[169]French,[170] or German,[171] and others. The challenges in defining the precise content of legal certainty persists, and scholars like Tridimas have emphasized the difficulties inherent in this task. . [172]

One of the reasons of these ongoing difficulties lies in the dynamic nature of legal certainty, which varies across different times and contexts. [173] This historical perspective underscores that grappling with uncertainties in legal frameworks, including tax law, has been a persistent challenge throughout the development of legal science.

Legal scholars generally concur that "*certainty*" and "*predictability*" are beneficial for law and regulation.[174] Figures like Radbruch characterize legal certainty as a "*fundamental legal value*", [175] while Bobbio argues that it is a requirement for regulated coexistence and an "*intrinsic element of the law*", serving to prevent arbitrariness and ensure equality. The consensus among legal

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[168]J. Frank, *Law and the Modern Mind*, (Routledge, 2009) (1st ed., New York, Brentano's Inc., 1930; 2nd ed. rev., New York, Coward-McCann, 1949); L. Fuller, *The Morality of Law*, (Yale University Press, 1964); J. Raz, 'The Rule of Law and its Virtue' in J. Raz, *The Authority of Law. Essays on Law and Morality*, (Oxford, Oxford Press, 1979), 221; J. Waldron, 'The Rule of Law in Contemporary Liberal Theory', (1989) Ratio Juris, v. 2, 79–96. More recently, on legal certainty, see J. Raitio, *The Principle of Legal Certainty in EC Law*, (Kluwer, 2003).

[169] E. Allorio, 'La certezza del Diritto dell'Economia'(1956), Rivista del Diritto dell'Economia, 1198–1212; M. S. Giannini, 'Certezza pubblica, (1969) Enciclopedia del Diritto, v. 6, Milano, Giuffrè, 769–792; F. Lopez de Oñate, *La certezza del Diritto*, (Giuffrè, 1968); M. Corsale, *Certezza del Diritto e crisi di legittimità*, (Giuffrè, 1979); L. Gianformaggio, "Certezza del Diritto", in G. Pino, *Studi sulla giustificazione giuridica*, (Giappichelli, 1986); C. Luzzati, *La vaghezza delle norme*, (Giuffrè, 1990). E. Diciotti, *Verità e certezza nell'interpretazione della legge*, (Giappichelli, 1999); G. Gometz, *La certezza giuridica come prevedibilità*, (Giappichelli, 2005). On tax law certainty, see E. Della Vale, *Affidamento e certezza del Diritto Tributario*, (Giuffrè, 2001).

[170] P. Roubier, *Théorie Générale du Droit*, (2nd ed., Sirey, 1951). Idem, Le *Droit transitoire : conflits des lois dans le temps*, (Dalloz, 1929/1933 (1st ed., 2nd v.), 1960 (2nd ed., 1st v.), 2008 (2nd ed.)). B. Pacteau, 'La sécurité juridique, un principe que nous manque?', (1995) AJDA, n. 20, p. 151; F. Luchaire, 'La sûreté, droit de l'homme ou sabre de M. Prudhomme?', (1989) RDP, 609; L. Favoreu, 'Une convention collective peut-elle comporter des dispositions à caractère rétroatif?', (1995), D. 1995–1, C. 82; M. Fromont, 'Le principe de sécurité juridique', (1996) AJDA, p. 178; F. Moderne, 'Actualité des principes généraux du droit', (1998) RFDA, 506; A.L. Valembois, *La Constitutionnalisation de l'exigence de sécurité juridique en Droit français*, (LGDJ, 2005). On tax law certainty, see Frédéric Douet, *Contribution à l'étude de la sécurité juridique en Droit interne français*, (LGDJ, 1997).

[171] M. Rümelin" (1935), *Methodische Grundfragen*, 6. (Aufsätze, 1946); Franz Scholz, *Die Rechtssicherheit*, (Walter de Gruyter, 1955). A. von Arnauld, *Rechtssicherheit*, (Mohr Siebeck, 2006). On tax law certainty, see Johanna Hey, *Steuerplanungssicherheit als Rechtsproblem*, (Otto Schmidt, 2002); A. Leisner, *Kontinuität als Verfassungsprinzip*, (Mohr Siebeck, 2002); Heinz-Jürgen Pezzer (Org.), *Vertrauensschutz im Steuerrecht, Deutsche Steuerjuristische Gesellschaft*, t. 27, (Otto Schmidt, 2004).

[172] T. Tridimas, *The General Principles of EU Law*, (Oxford University Press, 2006), 243.

[173] H. Ávila, 'Certainty in Law' (2016) Law and Philosophy Library, vol 114, 134-201. See also AJ Mackenzie Stuart, *The European Community and the Rule of Law* (Stevens, 1977).

[174] Raz (n. 167)841-42: "*Since the law should strive to balance certainty and reliability against flexibility, it is, on the whole, wise legal policy to use rules as much as possible for regulating human behavior as they are more certain than principles and lend themselves more easily to uniform and predictable application*.". See also R. Craswell and John E. Calfee, 'Deterrence and Uncertain Legal Standards', (1986)2 J.L. Econ. & ORG. 279, 298-99, (analysing two undesirable social effects that stem from uncertain regulation: (1) over-deterrence and (2) inefficient risk-taking); K. W. Gideon, 'Assessing the Income Tax: Transparency, Simplicity, Fairness', (1999) 25 OHIO N.U. L. REV. 101,104-06, (arguing against the use of broad standards in tax law because of the harm of uncertainty); A. Scalia, 'The Rule of Law as a Law of Rules', (1989) 56 U. Chi. L. Rev. 1175,1178-83, (arguing that courts should decide cases in such a way that provides guidance to lower courts, future legislators, and citizens); C. R. Sunstein, 'Problems with Rules', (1995) 83 Cal. L. Rev. 953, 957, (describing the conventional view that clarity of rules is a target of law). For a review of some of the main drawbacks of uncertainty in antitrust law, see D. A. Crane, 'Rules Versus Standards in Antitrust Adjudication', (2007) 64 Wash. & Lee L. Rev. 4

[175] G. Radbruch, 'Legal Philosophy', in AUTHOR, *The Legal Philosophies of Lask, Radbruch and Dabin*, (Harvard University Press, 1950), 107-111. S. Taekema, *The Concept of Ideals in Legal Theory*, (Kluwer Law International, 2003), 69-93.

scholars is that a legal order without certainty is inconceivable, [176] and systems grounded in legal certainty are viewed positively. This thesis aligns with the affirmation of the importance of legal certainty and aims to contribute to the pursuit of this fundamental legal value.

While there is agreement on the desirability of increased legal uncertainty, providing a clear or unanimous definition remains a subject of broad discussion.[177] Scholars often express the quasi-impossibility of achieving 100 per cent certainty in legal systems.[178] Frank considered that the notion of legal certainty as an absolute and unique result can be considered as a "*myth*" or "*chimaera*".[179] Popelier highlights that uncertainty is an inherent in legal orders,[180] And Leisner envisions potential challenges to the rule of law due to implicit contradictions in the concept of legal certainty.[181]Mazen and Valembois supported the thesis that legal systems consist of mechanisms that generate uncertainty,[182] formulating the paradox that the legal systems have lost their capacity to guarantee legal certainty.[183] Wagner attributes the uncertainty in legal systems to the persuasiveness of advocates in trials or the judge's knowledge at the time of the decision.[184] Llewellyn acknowledges that law may not always be certain but contends that this does not necessarily mean it is uncertain, stating: "*It does not show 'uncertainty' in the law […] What it shows is lack of 100 per cent certainty, and that is all it shows*."[185] Consequently, this thesis acknowledges the impracticality of achieving a 100 % dispute avoidance solution or perfect legal certainty.

Indeed, the studies suggest that uncertainty is an inherent and constant aspect of legal orders. The key consideration becomes determining an acceptable level of uncertainty and identifying when achievable certainty is possible. Recognizing the inherent degree of uncertainty in every legal system, the term "*certainty*" is understood with an embedded component of uncertainty. Aarnio, for instance, defines "*certainty*" in terms of the "*predictability of the legal consequences*"

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[176] N. Bobbio, 'La certezza del Diritto é un mito?', (1951) Rivista Intenazionale di Filosofia del Diritto 28, 150–151.

[177] B. Rathbun and C. Brian, Uncertain About Uncertainty: Understanding the Multiple Meanings of a Crucial Concept in International Relations Theory' (2007), International Studies Quarterly, 51, 533–557.

[178] J. R. Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?', 2007, 15 Tulane Journal of International & Comparative Law 541, 545–546.

[179] Frank (n. 185)35. See also J. Paul, 'Jerome Frank's Attack on the 'Myth' of Legal Certainty', (1957) 36 Nebraska Law Review. 547, 547–549. 20 years earlier Kelsen expressed the same concept, see H. Kelsen, *Reine Rechtslehre* (1934), trad. it. *Lineamenti di dottrina pura del diritto*, (Einaudi, 1952),
125). In some legal documents, American jurist who address certainty of law use the term "*legal indeterminacy". Both concepts* are different since the legal certainty serves two distinct functions: it guides them in complying with the law, and it protects them against arbitrary government action by controlling the use of the power to make and apply law, and the American legal indeterminacy is concerned principally only with the latter function. See J. Maxeiner, 'Policy and Methods in German and American Antitrust Law: A Comparative Study' (1986); See also B. Leiter, 'Naturalizing jurisprudence: essays on American legal realism and naturalism in legal philosophy' (2007), 17 Oxford University Press.

[180] P. Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker', (2008), 2 Legisprudence 47, Vol. II, No. 1, 50.

[181] W. Leisner, 'L'état de droit, une contradiction ?' in M. Waline (ed.), *Recueil d'études en hommage à Charles Eisenmann* (Paris, Cujas, 1977), 65-79.

[182] N-J. Mazen, *L'inécurité inhérente au système juridique*, (Université de Dijion, 1979), 665.

[183] A-L. Valembois, *La Constitutionnalisation de l'exigence de sécurité juridique en droit francais*, (LGDJ, 2005), 1.

[184] The legal realists first emphasized these uncertainties. See, e.g., J. Frank, *Law and the Modern Mind* (Brentano's Publishers,1930). For an economic discussion of errors in the fact-finding process, see R. Posner, 'An Economic Approach to Legal Procedure and Judicial Administration', (1973) 2 J. Legal Stud. 399.

[185] K. Llewellyn, 'On Reading and Using the Newer Jurisprudence', (1940) 40 Columbia Law Review 581, 599.

concerning actions and the alignment of law with of actions standards of value such as justice and fairness.[186] Schmidt similarly associates legal uncertainty with the "*lack of predicting law*", emphasizing the importance of predictability alongside procedural safeguards.[187] "*Predictability*", in this context, is seen as the acceptable level that laws should attain to be considered certain. It underscores the relevance of time, implying an ex-ante examination of the effect of laws. According to Calfee and others, legal uncertainty arises when individuals cannot be sure about the "*legal consequences*" attached to their possible courses of action.[188] The concept of predictability is measured by assessing the level of uncertain regarding the effects of the legal system provisions on the results of their actions.[189] D'Amato, in his definition of legal certainty, emphasizes the temporal component, particularly focusing on conducting an ex-ante verification of whether as specific action is legal. [190] This leads to the question of when a specific action is clarified as legal, and at what point this certainty is achieved.

From these previous studies, it is evident that legal certainty remains an unsolved issue. Achieving 100 percent certainty is deemed quasi-impossible. Nevertheless, the legal certainty principle demands that legal systems must strive for certainty to enable taxpayers "*to predict*" the legal consequences of their actions.[191]

2.3.3. Legal Certainty: A Principle to Guide Policymakers on an *ex-ante* Basis, and Judges on an *ex-post* Basis.

The critical aspect to highlight in this section is that achieving the "*predictability of legal consequences*" can be realized through various legal instruments falling under the principle of legal certainty. These legal instruments contribute to enhancing legal certainty either *ex-ante* or *ex-post*. The legal certainty principle is relevant on an ex-ante basis when impels governments: (i) to enact laws that are clear, certain and with predictable effect, and on an ex-post basis when it

[186] P. Comanducci, 'Aarnio and the Problem of Legal Certainty', (1995) 26 Rechtstheorie 27.
[187] S.K. Schmidt, 'Beyond Compliance: The Europeanization of Member States thorough Negative Integration and Legal Uncertainty', (2008) Journal of Comparative Policy Analysis: Research and Practice, 10:3, 299-308.
[188] J. E. Calfee and R. Craswell, 'Some Effects of Uncertainty on Compliance with Legal Standards', (1984) Virginia Law Review, Vol. 70, No.5, 965-1003.
[189] H. Wagner, 'Legal Uncertainty – Is Harmonization of Law the Right Answer? A Short Overview'. (2009). In this article the author defines the term "subjective legal uncertainty" refers here to the subjective assessment of marginal costs and marginal utility, which differs from individual to individual. Subjective legal uncertainty can also be referred to as "uncertainty as to what the law is". "Objective legal uncertainty" describes an objective reality that has to be accepted to an equal extent by all involved. It is found where statutory regulations for certain sets of facts are either non-existent or do not form a reliable basis for decisions: For example: Absence of law, legal instability, denial of justice.
[190] See, A. D'Amato, 'Legal Uncertainty' (1983). California Law Review, 71(1):1.55.
[191] The legal certainty principle is an essential component of the rule of law, which entail that "*law should be certain, so that it can be easily enforced and so that people can know where they stand. We expect it in our relation with authority, and in our relations with each other*". See R. Grote, 'Rule of Law, "*Rechtsstaat*" and "*Etat de droit*"', in C Starck (ed), *Constitutionalism, Universalism and Democracy: A Comparative Analysis; The German Contributions to the Fifth World Congress of the International Association of Constitutional Law* (Nomos, 1999), 271. Lord Mance, 'Should the law be certain?' The Oxford Shrieval lecture given in the University Church of St Mary, The Virgin, Oxford, 2011; See also Fenwick and Wrbka (n. 151).

requires (ii) to protect taxpayers when a determined degree of uncertain has made the effect of laws unforeseeable.[192]

Dispute avoidance mechanisms, such as tax rulings, represent one category of legal instruments designed to provide *ex-ante* certainty and mitigate the risk of disputes by addressing potential confrontational situations between taxpayers and tax administrations in advance.[193] This form of *ex-ante* protection from legal uncertainties aligns with the preferred solution proposed by the OECD/IMF in their reports on "*tax certainty*".[194] Early certainty is particularly effective for investment, as it reduces the risk of disputes arising *ex-post*. This form of *ex-ante* legal certainty reconciles the need for certainty emphasized by the OECD/IMF with the principle of legal certainty. Another ex-ante form of legal certainty occurs when the principle serves as guidance for lawmakers.[195]

However, legal certainty is not limited to an *ex-ante* basis through dispute avoidance mechanisms, or as a guidance for law-makers; it can also be pursued on an *ex-post* basis. In this scenario, the legal certainty principle acts as a guiding principle when judges evaluate (*ex-post*) whether the level of legal uncertainties goes beyond an acceptable threshold to the extent that taxpayers cannot foresee the legal consequences of their actions.[196]
The form of ex-post protection through judicial decisions has been a subject of study and debate among scholars. Leiter argues that judicial decisions contribute to legal uncertainty since are not always certain.[197]Others argued that judicial decisions are constantly uncertain.[198] Schmidt suggests that there are compelling arguments to believe that legal uncertainty is more closely tied to judicial than legislative policymaking.[199]Raz introduces arguments based on discretion, emphasizing that when judges face multiple optimal solutions to a legal problem, they have the discretion to choose the solution they prefer.[200] In this interpretation, legal uncertainty is not an inherent characteristic of law's vagueness, but rather refers to a permanent status of uncertainty until the judge publishes their judgment. The uncertainty is centered around the question of "*how will a certain case come out?*".[201] This interpretation aligns with the concept of legal uncertainty being resolved at a specific moment – when the court of the last instance upholds a tax position. [202] At that moment, all potential interpretations - or

[192] M. Fenwich and S. Wrbka, *Legal Certainty in a Contemporary Context*, (Springer 2016).
[193] Cf. 2(2.2.4).
[194] Cf. 2(2.2.2.).
[195] Raitio (n. 178).
[196] K. M. Sullivan, 'The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards', (1992) 106 HARV. L. Rev 22, 62-64.
[197] Leiter Ibid 19-20.
[198] J. R. Maxeiner, 'Some Realism About Legal Certainty in the Globalization of the Rule of Law', in Ed. M. Sellers and Tadeusz Tomaszewski, *The Rule of Law in Comparative Perspective*, (Springer 2020), 46.
[199] Schmidt (n. 163).
[200] J. Raz, 'Legal Principles and the Limits of Law', (1972) 81 YALE LJ. 823, 843-46, where the author affirms that judicial discretion operates where the law does not provide a uniquely correct solution.
[201] S. Rodin, Interpretation in the Court of Justice of the European Union: Originalism, Purposivism, and l'Economie Générale, (2019), American University International Law Review: Vol. 34, Issue 3, Article 6.
[202] According to Holmes, law consists of "*prophecies of what the courts will do in fact.*" O. W. Holmes, 'The Path of the Law', (1897) 10 Harv. L. Rev. 457, 461. Almost all of what is considered to respond to as "law" comes in the way *of predictions* of what a court or other official body would do if presented with some dispute. An individual's conduct is shaped or affected

all uncertainties - are reduced to a single "*certain*" solution. Coherently, the European Court of Human Rights emphasizes that "*where the courts have finally determined an issue, their ruling should not be called into question.*"[203]Similarly, the Directorate-General for Taxation and Customs Union defines tax uncertainty, [204] stating that"*until courts emit the final verdict the case remains open and taxpayers remain uncertain on what the correct behaviour should be*".[205] Ultimately, the reference point for testing legal uncertainty lies in whether the court of the last instance will uphold the taxpayer's tax position. This implies determining whether the tax position is compliant with the law or not. When taxpayers face legal uncertainty, they must anticipate that the tax position will be litigated to the court of the last instance, and that court will uphold or reject the position. The key is to assess the final result and its level of predictability to determine the certainty of the legal position, recognizing that a tax position challenged by a tax authority or the EC - in the case of State aid law infringements- does not necessarily mean it is non-compliant. Only the conclusive result and its predictability should serve as the basis for testing the certainty of the legal position.

In conclusion, despite the inherent uncertainty of law, a moment of certainty does exist. However, achieving that moment typically occurs on an *ex-post* basis. All other forms of *ex-ante* certainty maintain an inherent component of uncertainty. The protection provided by the principle may have different effects depending on when legal certainty can be provided. On an ex-ante basis, the term "*certainty*" is intended as predictability, and the *ex-post* certainty is intended as certainty without ambiguities. Time is a crucial factor, and, as will be argued in the next section, only the legal certainty through *ex-ante* protection is relevant for investment. This form of legal certainty can potentially align with the tax certainty concept as envisioned d by the OECD/IMF.

2.3.4. Distinguishing the OECD/IMF Tax Certainty from the Legal Certainty Principle: The *ex-post* Remedies to Protect Taxpayer are Ineffective for Investment

In this section, we will explore the distinction between tax certainty and legal certainty in taxation to assess whether the legal certainty principle is a viable means to foster investment and trade, as proposed by the G20 in their "*tax certainty agenda*".

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by a rule exactly according to her (or her lawyer's) perception of the chances that she will be sanctioned on the ground that she violated the rule. See also A D'Amato, 'The Limits of Legal Realism', (1978) 87 YALE LJ. 468, 481-82.. One theoretical objection to viewing law as a prediction of a judge's behaviour has been the idea that such a view would offer no standard for the judge himself. Thus, "*such a definition of law may be considered to be question-begging. This theoretical objection is arguably invalid because it is possible to see the judge's role as a post hoc fulfilment of the best lawyer's prediction of what a judge would decide*". See D'Amato ibid. 495-98. See also G. Dari-Mattiacci and B. Deffains, 'Uncertainty of Law and the Legal Process', (2007) Journal of Institutional and Theoretical Economics, Vol.163, No.4, 627-656.

[203] *Ryabykh v Russia* (App no 52854/98) (2003) EHRR 2003-IX.

[204] Cf. 2.2.3.

[205] Directorate-General for Taxation and Customs Union (n. 136).8. Taxation Papers are written by the staff of the European Commission's Directorate-General for Taxation and Customs Union, or by experts working in association with them. Taxation Papers are intended to increase awareness of the work being done by the staff and to seek comments and suggestions for further analyses. These papers often represent preliminary work, circulated to encourage discussion and comment – the views expressed are those of the authors and not of the European Commission.

Tax certainty stands as a political priority for the G20, a central tenet in the "*IMF/OECD Report on tax certainty*",[206] and is also endorsed by the CFE when proposing that "*tax certainty*" shall be a priority in EU policy.[207] It is a key objective put forth by G20, IMF, OECD, and CFE to improve investment and trade.

The aim here is to investigate whether the concept of legal certainty aligns with tax certainty, as intended by the IMF/OCED, and whether the legal certainty principle is effective in fostering investment and trade. Legal certainty has gained prominence as a principle to counteract uncertainty in the legal orders,[208] and similarly the OECD/IMF tax certainty has been advocated as a means to address uncertainty.[209] It appears that the OECD/IMF tax certainty is conceived as the application of the legal certainty principle in the realm of tax law sphere. Essentially, the legal certainty principle applied within the tax law framework does not differ from the general concept of legal certainty.[210] In other words, there are not two distinct principles of legal certainty; rather, there are subtle differences related to how legal certainty is protected in the sphere of tax law and the nature of the relationship between all these rules.[211] At a first glance, "*the IMF/OECD tax certainty*" can be a way to express "*tax law certainty*", aiming to define the legal certainty principle within the tax framework.

However, the legal certainty principle does not entirely coincide with the "*OECD/IMF tax certainty*". The distinction can be outlined in terms of (i) the value on which they are based, and (ii) the moment of certainty required to be effective for their respective final aim.
Firstly, the "*OECD/IMF tax certainty*" is grounded in economic grounds. The G20 explicitly stated that tax certainty should be enhanced to foster investment and trade.[212] Economic literature does not unanimously confirm the intuitively plausible result that tax uncertainty discourages investments. Some argue the counterintuitive result that tax uncertainty foster investments.[213] Other studies affirm the negative correlation between tax uncertainty and investment, highlighting the intuitive outcome that "*they cannot make plans if they do not have confidence in the tax structure", thus demonstrating at the end that the impact of tax uncertainty depends on*

[206] See 2 (2.2.2).
[207] See 2 (2.2.5).
[208] A.L. Valembois, *La Constitutionnalisation de 1'exigence de securité juridique en droit francais*, (LGDJ, 2005).
[209] See 2 (2.2.2).
[210] C. G. Novoa, *El principio de seguridad jurídica en materia tributaria*, (Marcial Pons, 2000), 91, 104.
[211] A.P. Dourado, 'General Report - In Search of Validity in Tax Law: The Boundaries Between Creation and Application in a Rule-of-Law State', A.R Dourado (ed) *Separation of Powers in Tax Law* (ed.), , (IBFD, 2010), 30-31.
[212] See point 19 of the G20 Leaders' Communique, Hangzhou Summit, 4-5 September 2016: "We emphasize the effectiveness of tax policy tools in supply-side structural reform for promoting innovation-driven, inclusive growth, as well as the benefits of to promote investment and trade and ask the OECD and IMF to continue working on the issues of pro-growth tax policies and tax certainty".
[213] R. Hartman, 'The Effects of Price and Cost Uncertainty on Investment', (1972) Journal of Economic Theory 5 (2): 258-266; A. B. Abel, 'Optimal Investment under Uncertainty', (1983) American Economic Review 73(1), 228-233. Some other authors have found neutral results: see R. Hall and D.W. Jorgenson, 'Tax Policy and Investment Behavior', (1967) American Economic Review 57 (3), 391–414.

the source and nature of the uncertainty".[214] Despite the theoretical challenges in measuring tax uncertainty, the empirical evidence confirms the negative correlation between investments and tax uncertainty.[215]

In contrast, the legal certainty principle is not driven by economic reasons but rather by legal ones. While constitutional and economic perspectives may overlap, they frequently differ.[216] The legal certainty principle is aimed at protecting personal freedom.[217] A clear law enables individuals to plan their life, and this ability is closely tied to the affirmation of individual freedom.[218] Liberalism asserts that legal rules are essential for freedom, as Cicero stated, "*we are all slaves to the law so that we may be free*".[219] The law clarifies what facts individuals can rely on, expanding the range within which they can predict the consequences of their actions.[220] The law becomes "*data on which the individual can base his own plans*", meaning that "*individual need never be coerced unless he has placed himself in a position where he knows he will be coerced*."[221] The ability of individuals to avoid the coercive power of the state, or in other words, their freedom, is "*dependent upon certain attributes of the law*" with "*certainty*" being principal among them.[222] "*All coercive action of government must be unambiguously determined*," as proclaimed by Hayek.[223]

The protection of the taxpayers' freedom, as per the legal certainty principle, is independent of any correlated positive or negative effects on investment and trade. This fundamental difference lies at the core of the distinction between the concept of tax certainty promoted by

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[214] D.S. Bizer and K.L. Judd, 'Taxation and Uncertainty', (1989) American Economic Review, 79(2). 331-36; R. S. Pindyck, 'Irreversible Investment, Capacity Choice, and the Value of the Firm' (1988) American Economic Review 78(5) - 969–85; K.A. Hasset and G.E. Metcalf, 'Investment with Uncertain Tax Policy: Does Random Tax Policy Discourage Investment?', (1999) Economic Journal, 109(457), 372-93. H. Boehm and M. Funke, 'Optimal Investment Strategies under Demand and Tax Policy Uncertainty', (2000) CESifo Working Paper, No. 31; Lund (n. 5); B. A. Blonigen, L. Oldenski and N. Sly, 'The Differential Effects of Bilateral Tax Treaties', (2014) American Economic Journal: Economic Policy, Vol. 6,1-18; K. Hasset and J. Sullivan, 'Policy Uncertainty and the Economy: A Review of the Literature, Prepared for "Exploring the Price of Policy Uncertainty" A conference co-sponsored by the Becker-Friedman Institute and the Urban Institute Center for Global Development, Washington, DC, April 7-8, 2015.

[215] K. Edmiston, 'Tax Uncertainty and Investment: A Cross-Country Empirical Examination', (2004) Economic Inquiry 42.3, 425-440. See also Federal Open Market Committee 2009, "Widespread reports from business contacts noted that uncertainties about health-care, tax, and environmental policies were adding to businesses' reluctance to commit to higher capital spending", IMF (2012), xv–xvi and 49–53, and (2013), 70–76; S. R. Baker, N. Bloom and S.J. Davis, 'Measuring Economic Policy Uncertainty', (2016), The Quarterly Journal of Economics Vol.131, 1593–1636. See also A. K. Hassettand E.G. Metcalf, 'Investment with Uncertain Tax Policy: Does Random Tax Policy Discourage Investment?', (1999), The Economic Journal, Vol. 109, No. 457 372-393. M.P. Devereux, 'Measuring Corporation Tax Uncertainty Across Countries: Evidence from a Cross-Country Survey, Oxford University Center for Business Taxation, European Tax Policy Forum, 2016. http://www.smartsurvey.co.uk/s/CBTandETPFsurvey/ ; last accessed date 01.09.2020.

[216] W. Haslehner, 'Time and Tax: Constitutional Versus Economic Perspective', in W. Haslehner, G. Kofler and A. Rust (eds), *Time and Tax, Issues in International, EU, and Constitutional Law*, (Wolters Kluwer International B.V., 2019), 271.

[217] Legal principles are not purely moral principles, they are standards which are specific for the law. See: R. Alexy, 'On the Structure of Legal Principles', (2000), Ratio Juris 295.

[218] N. Bobbio, 'Le Bon Législateur', in H. Hubien (ed.), *Le Raisonnement Juridique* (Bruylant, 1971), 243-249; L. Nowak, 'De la Rationalité du Législateur comme Elément de l'Interprétation Juridique',(1969) Logique et Analyse 65-86; F. Ost, 'L'Interprétation Logique et Systématique et le Postulat de Rationalité du Législateur', in M. Van de Kerchove (ed.), *L'Interprétation en Droit* (FUSL, 197897-184 ; Waldron (n. 178)79.

[219] See M.T. Cicero, '*Legum servi sumus u tliberi esse possimus*' in Cic. Pro Cl. 53.146 cited in L. Fezzi, *QuaderniLupiensi di Storia e Diritto*, Nº. 3, 2013, 117-128; See also B. Gray. 'Freedom, Ethical Choice and the Hellenistic Polis'. (2018) History of European Ideas 44:6719-742.

[220]F.A. Hayek, *The Constitution of Liberty*, (Routledge, 1960), 156–57.

[221]Ibid 21.

[222]Ibid 167.

[223]Ibid 222.

the G20 and the legal certainty principle. The legal certainty principle mandates that taxpayers are able to foresee the effect of law, and law enforcement. In legal science, any eventual positive effect of investment and trades is not a determining factor. The legal certainty principle is a fundamental right of taxpayers,[224] and it cannot be modified or adapted based on potential negative consequence for investment and trade. On the contrary, the possible benefits of investment and trade may be a positive (albeit unwanted) consequence of the legal certainty principle, but they are not obligatory or actively pursued. The differing objectives of legal certainty and tax certainty confirms the divergent approach between law and economics compared to the more traditional legal perspective.[225] Law and economics have a different approach to the concept of tax certainty.[226] While economics scholars emphasise the objective of economic growth, they seem ignoring the intrinsic value at the basis of legal certainty.[227]

Secondly, legal certainty and tax certainty require and encompass different moments of certainty to achieve their distinct final aims. The OECD/IMF Tax certainty primarily aims to enable taxpayers to predict the effects of the law on an *ex-ante* basis, a crucial requirement for fostering investment. On the other hand, the concept of legal certainty within the tax law framework seeks certainty on both *ex-ante* and *ex-post* basis. It can be defined as a "*principle norm that requires the legislative, executive and judiciary to behave in ways that contribute more to the existence of a higher state of legal calculability and reliability based on complete knowability, from the perspective of taxpayers and for their benefit, through the juridical-rational norms, as an instrument that guarantees respect for their capacity to shape the present in a worthy and responsible manner and to plan the future strategically in a legally informed manner, without deceit, frustration, surprise or arbitrariness*".[228]

When the legal certainty principle operates on an *ex-ante* basis, it serves as a guide for legislators and policymakers to draft and enact laws that are as clear as possible.[229] The clarity and foreseeability of law's effects can result in increased investment activity.[230] Max Weber articulated the importance of legal certainty for capitalism, stating that: "*Capitalistic enterprise […] cannot do without legal security*", since such legal certainty was paramount for the investment of capital.[231] The need for a legal system that "*function [s] in a calculable way*" is vital for "*bourgeois*

[224] P. Popelier, Legal Certainty and Principles of Proper Law Making, (2000) Eur. JL Reform; 2: 321.
[225] H. Gribnau and Melvin Pauwels, 'Retroactivity and Tax Legislation in the Netherlands. A Theoretical Approach and Assessment', (2009) International Tax Law Review. 144-145. The term "old view" is used by economics scholars to indicate the more traditional legal view: See in that respect K.D. Logue, 'Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment', (1996) Michigan Law Review, 1136. For an economics approach on (tax) transitional law, see M.J. Graetz, 'Legal Transitions: The Case of Retroactivity in Income Tax Revision', (1977), University of Pennsylvania Law Review 47-87, M.J. Graetz, 'Retroactivity Revisited', (1985), Harvard Law Review 1820-1841, L. Kaplow, 'An Economic Analysis of Legal Transitions', (1986) Harvard Law Review 509-617 and D.N. Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity* (University of Chicago Press, 2000).
[226] See for law and economics approaches on (tax) transitional law, especially Graetz ibid Graetz ibid, Kaplow ibid and Shaviro ibid. Note that there are some differences between these approaches.
[227] Gribnau and Pauwels (n. 213)144-145.
[228] H. Ávila, 'The Concept of Tax-Law Certainty', in H. Avila, *Certainty in Law*, (Springer International Publishing, 2016), 195-198.
[229] Popelier (n. 212).
[230] *See, e.g.,* Kevin A. Hassett and Gilbert E. Metcalf, 'Investment with Uncertain Tax Policy: Does Random Tax Policy Discourage Investment?', (1999) 109 ECON. J.372, 388.
[231] M. Weber, *Economy and Society 883* in Guenther Roth & Claus Wittich (eds.), (Univ. of California Press,1978).

interests", with calculability referring to "*an unambiguous and clear legal system*".[232] Legal certainty is a principle conceived to enable taxpayers to plan their future and calculate the compliance of the tax position.[233]In this context, legal certainty aligns with the OECD/IMF tax certainty since both of them have been considered relevant for investments and trades.[234] Moreover, the legal certainty principle operates via other legal instruments, such as the dispute avoidance mechanisms, which were the proposed solutions provided by the IMF/G20 in their report on tax certainty.[235] The positive correlation between dispute avoidance mechanisms and investments is also present in some European Union's official documents. For instance, the EU Directive 2015/2376, which provides for the mandatory automatic exchange of information concerning cross-border tax rulings or advance pricing agreements, states that the issuance of tax ruling (or APA) *"can encourage investment and compliance with the law*".[236] In the same vein, the OECD TPG assert that the certainty provided by APAs enhance capabilities to predict the tax liabilities, thereby "*providing a tax environment that is favourable for investment*".[237] Therefore, on an *ex-ante* basis, the legal certainty principle and tax certainty coincide. Although the primary purpose of the legal certainty principle is not economic-driven, it can contribute to fostering investment and trade.

In summary, legal certainty can be pursued both on an *ex-ante* basis, through dispute avoidance mechanisms, and on an *ex-post* basis. [238] In the latter case, the legal certainty principle function as a guiding principle when judges assess (*ex-post*) whether the level of legal uncertainty exceeds an acceptable threshold, rendering taxpayers unable to foresee the legal consequences of their actions.[239] Recent EC investigations on dispute avoidance mechanism have seen many investigated MNEs invoking legal certainty. Within State aid law, the legal certainty principle protects taxpayers from EC recovery orders when the State aid law's legal effect was considered unforeseeable.[240]

Judges, in an *ex-post* evaluation, must determine whether the legal rules were sufficiently clear and precise, enabling their application to situations to be foreseeable, and taxpayers are able to discern their rights and obligations. Taxpayers can only adhere to the law if they comprehend it. If a determined level of law uncertainty marks that legal context, a taxpayer has the right to be protected from those unforeseeable law effects. This *ex-post* protection provided by the legal certainty principle through judgments is less relevant and ineffective for investment decisions. The *ex-post* protection can be granted even more than ten years after the

[232]Ibid 847.
[233] Gribnau (n. 143)
[234] OECD, 'Corporate Tax Incentives for Foreign Direct Investment', OECD Tax Policy Studies, No. 4, OECD Publishing, 2001).; S. Sarkar, 'Attracting private investment: Tax reduction, investment subsidy, or both?', (2012) Economic Modelling, 29(5): 1780-1785.
[235] Cf. 2 (2.4).
[236]Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332, 18.12.2015, Recital 1, p. 1.
[237] OECD (n. 11)219-220.
[238] Popelier (n. 212).
[239] Case C-63/93, *Duff and Others* [1996] ECR I-569 [20]; Case C-107/97, *Rombi and Arkopharma* [2000] ECR I-3367 [66]; Case C-199/03, *Ireland v Commission* [2005] ECR I-8027 [69]; Case C-17/03, *VEMW and Others* [2005] ECR I-4983 [80]; Case C-158/06, ROM-Projecten [2007] ECR I-5103 [25].
[240] See Cp. 3.2.5.

tax position is concluded. The certainty crucial for investment decision should ideally be provided before the decision becomes irrevocable, otherwise, this ex-post certainty holds less appeal for investment and trade.[241]

2.3.5. Partial Conclusion

Legal scholars generally concur that legal certainty and predictability are valuable attributes for law and regulation, [242] considering certainty as a fundamental characteristic of a legal system, while uncertainty is considered a drawback. [243] As a result, there is a consensus on the importance of seeking legal solutions to reduce uncertainty.

This thesis aligns with the prevailing viewpoint, asserting that legal certainty can be pursued both proactively and retroactively. Dispute avoidance mechanisms serve as a legal tool that can provide proactive certainty, aligning the objectives of law and economics, while safeguarding freedom and promoting investment and trade. In this context, legal certainty and tax certainty (as defined by the IMF/OECD) are in agreement.

However, legal certainty can also be pursued retroactively. In this case, the principle of legal certainty serves as a guiding principle when judges must assess (retroactively) whether the level of uncertainty exceeds an acceptable threshold, preventing taxpayers from anticipating the legal consequences of their actions. While this retroactive legal certainty aligns with the taxpayer's right to protection from unforeseeable legal effects, it is acknowledged as being less effective for fostering investment and trade.

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[241] Hartman (n. 201); R. Niemann, , 'The Impact of Tax Uncertainty on Irreversible Investment', (2011) Review of Managerial Science, vol. 5(1): 1-17; K.A. Hasset, and G.E. Metcalf 'Investment with uncertain tax policy: does random tax policy discourage investment?', (1999), The Economic Journal, Vol. 109(457): 372-393; B. Julio, and Y. Yook 'Political uncertainty and corporate investment cycles', (2012), Journal of Finance, vol.76(1): 45-83; W.Kang , K. Lee and R.A. Ratti 'Economic policy uncertainty and firm-level investment', (2014),Journal of Macroeconomics, vol. 39: 42-53; B. Kelly, L. Pastor and P. Veronesi 'The price of political uncertainty: theory and evidence from the option market', (2016), The Journal of Finance, vol. LXXI(5); B.K. Johannsen 'When are the effects of fiscal policy uncertainty large?', (2014), Finance and Economics Discussion Series, Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington, D.C., Working Paper No. 40.

[242] Raz (n. 167)841-42: "*Since the law should strive to balance certainty and reliability against flexibility, it is, on the whole, wise legal policy to use rules as much as possible for regulating human behavior as they are more certain than principles and lend themselves more easily to uniform and predictable application*.". See also R. Craswell and John E. Calfee, 'Deterrence and Uncertain Legal Standards', (1986)2 J.L. Econ. & ORG. 279, 298-99, (analyzing two undesirable social effects that stem from uncertain regulation: (1) over-deterrence and (2) inefficient risk-taking); K. W. Gideon, 'Assessing the Income Tax: Transparency, Simplicity, Fairness', (1999) 25 OHIO N.U. L. REV. 101,104-06, (arguing against the use of broad standards in tax law because of the harm of uncertainty); A. Scalia, 'The Rule of Law as a Law of Rules', (1989) 56 U. Chi. L. Rev. 1175, 1178-83, (arguing that courts should decide cases in such a way that provides guidance to lower courts, future legislators, and citizens); C. R. Sunstein, 'Problems with Rules', (1995) 83 Cal. L. Rev. 953, 957, (describing the conventional view that clarity of rules is a target of law). For a review of some of the main drawbacks of uncertainty in antitrust law, see D. A. Crane, 'Rules Versus Standards in Antitrust Adjudication', (2007) 64 Wash. & Lee L. Rev. 4.

[243] K. E. Davis, 'The Concept of Legal Uncertainty: Definition and Measurement', (2011), available at: http://ssrn.com/abstract=1884664.

2.4. Legal Certainty in the EU

2.4.1. Introduction

This thesis aims to enhance the level of legal certainty within the State aid law framework, with a particular focus on TP transactions. Consequently, it is crucial to establish a definition of legal certainty under EU law. The first part of the introduction delineates the hierarchical position of the legal certainty principle within the EU law framework. Subsequently, the focus shifts to defining the content and primary attributes of the principle, elucidating its development into several sub-principles, including the legitimate expectations principle. Following this, a comparability analysis will be conducted between the legal principle and the legitimate expectations principle to identify distinct characteristics.

Emphasizing the distinctive characteristics between legal certainty and legitimate expectation is crucial for assessing whether the GC and the EC have correctly denied the protection of legal certainty and if the legal certainty principle has been reduced to the legitimate expectations principle. Notably, in recent EC investigations of dispute avoidance mechanisms, several MNEs under scrutiny have claimed the protection of the legal certainty principle. Within the framework of State aid law, the legal certainty principle protects taxpayers from the EC's recovery order when the legal effects of State aid law were considered unforeseeable.

2.4.2. Hierarchy of the Legal Certainty Principle

According to Art. 6(3) TFEU, the legal certainty principle holds the same legal status as primary EU law, and it requires that EU institutions and member states adhere to this principle by acting accordingly. The CJEU has derived the principle of legal certainty from the principle of the broader principle of the rule of law,[244] Which is explicitly enshrined in Article 2 TEU: "*Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and the respect of human dignity*".[245] The rule of law, a fundamental principle of the EU, encompasses procedural and substantive accountability of the administration before the courts.[246]
Under the general broad principle of the rule of law, the CJEU has clearly stated that legal certainty is also one of EU law's fundamental principles.[247] The CJEU developed the general principles from the national constitutions to reduce conflicts with national provisions.[248] Like the other general principles of EU law, the legal certainty principle has gained constitutional

[244] See Case C-234/04 *Kapferer* [2006] ECR I-2585, paras 20 ff. See also Committee Minister, The Council of Europe and the Rule of Law - An Overview, CM(2008)170 (21 November 2008), see para. 51.
[245] Art 2 TEU.
[246] P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', (1997) PL 467.
[247] Case C-323/88 *Sermes* [1990] ECR 1-3027, esp. 1-3050.
[248] P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 334 and 337.

status,[249] and has been elevated to the same level as the founding Treaty "*so-called primary law*".[250] The Charter of Fundamental Rights, aligning with the values of the Treaties, played a significant role in establishing the primary status of the legal certainty principle..[251]
Notably, Advocates General Kokott and Sobotta argued that fundamental rights may hold an even higher value than some of the Treaty provisions.[252] In the same vein, the CJEU has affirmed fundamental rights as "*constitutional principles,*" recognizing their significance by ranking fundamental rights higher than other "*non-constitutional*" Treaty provisions.[253] While, in principle, fundamental rights do not take precedence over Treaties,[254] they can influence primary law interpretation, and potentially in exceptional circumstance even going *contra legem*.[255]The Treaties do not enjoy automatic precedence over the general principles of law; on the contrary, the principles can prevail over the Treaty under some circumstances.[256] Whether the Treaty or the principles prevail, it depends on a proportionality test carried out on a case-by-case, where the interest of ensuring the general principles' application is balanced against the internal market's interests.[257]
Within the EU legal order, the legal certainty principle derives not only from the EU principles but also from the constitutional principles which are common to member states: in the Benelux countries *rechtszekerheid,* in Finland *oikeusvarmuuden periaate,* in France *sécurité juridique*, in Germany *Rechtssicherheit*, in Italy *certezza del diritto,* in Poland *do obowiazujacego prawa,* in Spain *la seguridad jurídica*, and in Sweden *rättssäkerhet*.[258]
Despite the normative foundations, the legal certainty principle, like other general principles, has not turned into positive law norms. Within the State aid law framework, Art. 16 of Procedural Regulation is the legal act that turns the legal certainty principle's applicability into

[249] Case C-101/08 *Audiolux*, para 63; CJEU, 2009, Case C-174/08 *NCC Construction Danmark A/S Skatteministeriet*, paras 42 and 45.
[250] Primary law, (and secondary law) was mentioned by the Court in CJEU, 27 October 1992, Case-240/90, *Germany v Commission*, para 42. EU law recognises the status of primary law at the Treaty of the European Union, the Treaty of the Functioning of the European Union, the Charter of the Fundamental rights of the European Union, the Treaty establishing the European Atomic Energy Community, Treaties amending the funding Treaties, Accession Treaties and Acts of Accession, Protocols annexed to the Treaties by common accord of the Member States. Fundamental rights have been placed at the same level of the primary law, see *inter alia* Case C-70/88 *European Parliament v Council*. CJEU, 22 May 1990, See also K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union*, (2nd edition,Thomson Sweet & Maxwell 2005), 231.
[251] Art. 6(1) TEU.
[252] J. Kokott, and C. Sobotta, 'The Charter of Fundamental Rights of the European Union After Lisbon', (2010) EUI WP, AEL, 2010/6, 6.
[253] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, ECLI:EU:C:2008:461 para 285.
[254] Case C-314/85 ECLI:EU:C:1987:452 in the light of the principle of legal certainty.
[255] A. Arnull, 'What is a General Principle of EU Law?', in R. de la Feria and S. Vogenauer (eds.), *Prohibition of Abuse of Law, A New General Principle of EU Law?,* (Hart Publishing 2011), 12.
[256] Case C-112/00 *Schmiderger*, ECLI:EU:C:2003:333, para 80.
[257] As far as EU law is concerned, the principle of proportionality is explicitly laid down in Article 5(4) Treaty on European Union (TEU). Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 03727; Case 8/74 *Dassonville* [1974] ECR 837 [5]; Case 104/75 *Adriaan de Peijper* [1976] ECR 613; Case C-120/78 *Cassis de Dijon* [1979] ECR 649; Case C-15/83 *Denkavit Nederland* [1984] ECR 2171.
[258] The Court confirmed the protection of the general principles of Member State, as fundametal rights considered as integral part of EU law: See Case n. 4/73, *Nold*, Judgment of 11.1.1977, EU:C:1974:51, para. 13 CJEU, 17 December 1970, Case 11/70, *Internationale Handegesellschaft v, Einfuhrund Vorratstelle fur Getriede und Futtermittel*, ECLI:EU:C:1970:114 para.4. See also, J. R. Maxeiner (n. 185)47, 48, 49, 50, 52, 50, 53, 55, 56.; H. Leawoods and G. Radbruch. An Extraordinary Legal Philosopher', (2000) 2 Washington University Journal of Law & Policy 489, 493.

a positive norm. Due to its origin from primary law, the legal certainty principle's constitutional status constitutes EU law at the same level of primary law for the scope limited to the principle's applicability and guidance. In this regard, the legal certainty principle is not exclusively addressed to legislative bodies, but also to administrative authorities when issuing administrative orders.[259]
In summary, the acknowledgment is unanimous that EU law is grounded in the rule of law, and the legal certainty principle is an inherent element of EU law. [260]

2.4.3. The General Principle of Legal Certainty under EU Law

The legal certainty principle, as a general principle of EU law, is commonly defined as follow: "*the principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situation and legal relationship governed by EU law*".[261] This definition, reiterated in CJEU case law and also reflected in ECHR case law, embodies key elements.[262]

The first requirement, "*clarity and precision*", suggests that rules should attain a level of semantic perfection to ensure unambiguous understanding by any addressee.[263] The CJEU has refined this requirement further, introducing the "*unequivocally*" standard.[264] Under this standard, individuals must be able to ascertain their rights and obligations without any doubt. The legal provision and its application must be specific enough to guide conduct, allowing affected individuals to align their behaviour with these provisions.[265] Even in cases involving alternative solutions, the unequivocal requirement remains effective. The clarity requirement also emphasizes the importance of the judiciary in clarifying the normative content of rules, to facilitate the guidance of their behavior (with professional advice when needed). This underlines that a rule cannot be applied to a situation that happened before the rule was established and published.[266] The clarity requirement rejects over-broadly termed rules as they are incapable of guiding behavior.[267] Under the same requirement, it is stressed the importance

[259] Case T-43/02 *Jungbunzlauer AG v Commission* ECLI:EU:T:2006:270 [2006] ECR II-3435, para 72.
[260] Tridimas (n. 175)20; Popelier (n. 212).
[261] Case C-48/14, *Parliament v Council*, EU:C:2015:91, para 45.
[262] The first acknowledgement of the legal certainty principle was made by the CJEU in 1961: Case C-42/59 Société nouvelle des usines de Pontlieue—*Aciéries du Temple (SNUPAT) v High Authority* [1961] E.C.R. 103. See also P. Popelier (n. 212). *Korchuganova v. Russia*, App No. 75039/01, Judgment, 47 (Eur. Ct. H.R. June 8, 2006) ECtHR, 23 Feb. 2006, *Stere and Others v. Romania* (Application no. 25632/02), ECLI:CE:ECHR:2006:0223JUD002563202, para. 53; ECtHR, 14 Apr. 2009, S*.C. Ghepardul S.R.L. v. Romania* (Application no. 29268/03), ECLI:CE:ECHR:2009: 0414JUD002926803, para. 56; In the case of *Nejdet Şahin and Perihan Şahin v Turkey* (Application no. 13279/05) para 56, the ECtHR even held that "the principle of legal certainty [… was] implicit in all the Articles of the Convention".
[263] Maduro has theorised the rejection of this unattainable objective. See: E. Paunio, *Legal Certainty in Multilingual EU Law : Discourse and Reasoning at the European Court of Justice*, (Ashgate, 2013), 5-50.
[264] C-345/06, *Heinrch*, E.C.R. I-1659, 2009, para 44.
[265] Joined cases 212 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, para 10.
[266] Case C-63/83, *Regina v Kent Kirk* [1984] ECR 2689, para 21; C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023, para 45. Case T-115/94, Opel Austria v Council, ECLI:EU:T:1997:3, paras 21 and 45.
[267] Case 325/85, *Ireland v Commission of the European Communities* [1987] ECR 5041, para 18.

of the judiciary in relation to the ultimate definition of rules' normative content, and consequently the question of judge-made law.[268]

The second requirement of legal certainty, which is predictability (or foreseeability), focuses on the correct management of legal effects and plays a crucial role in building the necessary confidence in the legal system.[269] Predictability is closely linked to the temporal aspect of the law, encouraging prospective legislation and limiting retroactive regulation. It encompasses legislative changes, and previous case-law, extending beyond legislation to cover the protection of established legal situations. This prevents such situations from being endlessly contested or revoked after legal remedies have expired, emphasizing the stability of legal situation. Predictability is also associated with the concept of *res judicata* and limitation periods, reinforcing the notion that legal certainty opposes unlimited contestation and ensures stability.

Avila contributes to the understanding of legal certainty by introducing a third requirement: (i) "*Knowability*"[270] (ii) "*reliability*", and (iii) "*calculability*".[271] "*Knowability*", closely related to the present, refers to the possibility to know the content of the law, allowing individuals to foresee the legal consequences of the actions and understand *ex-ante* the limits of the state's coercive. The informative function of the publication of laws enables individuals to be aware that certain rules in force.[272] Accessibility, a component of knowability, supports the Latin principle of "*ignorantia juris non excusat*" (ignorance of the law does not excuse).[273] Knowability or accessibility serves as a pre-condition for understanding the content of law before action, aligning with the *ex-ante* requirement of legal certainty.
The concept of "*reliability*" within the legal certainty principle primarily addresses the *ex-pos*t protection of a legal position. It involves: (i) protecting expectations and guarantees foreseeable change, namely does not have retroactive effect by respecting *res judicata*, acquired rights,[274] (ii) it is limited to establishing procedures and requirements related to the transition from the past law to the new law. The reliability requirement acknowledges that law is not immutable, allowing for changes through established procedures that limits arbitrariness and inconsistency.[275] Respecting *res judicata*, or acquired rights (final), is crucial for achieving legal certainty, providing a balance between the need for legal evolution and the desire for

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[268] Legal certainty is relevant in interpreting norms by banning contra-legem interpretations or from determining or aggravating criminal liability. See: See e.g., Judgments of 30 April 2014 in C-26/13*Kásler y Káslerné Rábai*, , EU:C:2014:282, para. 65, and of 15 January 2014 in C-176/12*Association de médiation sociale*, , EU:C:2014:2, para. 39. Judgment of 8 October 1987 in C-80/86*Kolpinghuis Nijmegen*, , EU:C:1987:431, para. 13-14. Judgment of 16 June 2005 in C-105/03*Maria Pupino*, , EU:C:2005:386, paras. 44-45

[269] See von Bogdany and Ioannidis (n. 174); T. Tridimas (n. 175)4-7.

[270] "knowability" is the terms used by Avila, in H. Avila, *Certainty in Law*, (Springer International Publishing 2016), 43.

[271] Ibid.

[272]Popelier (n. 212) where the author clarifies that it is necessary for a legal system to "uphold the presupposition that once a legal rule is published, everyone is bound by it and must obey it".

[273] The Latin for "ignorance of the law does not excuse" or "ignorance of the law excuses no one" is a principle holding that a person who is unaware of a law may not escape liability for violating that law merely because he or she was unaware of its content; therefore, persons have presumed knowledge of the law except the ignorance was excusable. See B. Garner, *Black's Law Dictionary*, (8th ed., Thomson West, 2004).

[274] Avila (n. 256) 69.

[275] A.L. Valembois, *La constitutionnalisation de l'exigence de sécurité juridique en Droit Français*, (LGDJ, 2005, 17 ; J-B. Racine e Fabrice Siiriainen (Orgs.), *Sécurité Juridique et Droit Économique*, (Larcier, 2008), 13.

stability.[276] The desire stability of law and the non-retroactivity protection are not exhausted with formal correctness, but they must also cover substance. In other words, the retroactivity does not entail only the source element (the norm enacted), but also the content element. The scope of the reliability requirement is not just limited It is to the retroactivity of laws but also the retroactive interpretation that changes the content of the same norm.[277] This flexibility component of the interpretation of laws can affect legal certainty, and therefore may trigger a judicial protection based on the principle of legal certainty.[278]
The concept of "*calculability*" is the third requirement of legal certainty, and arguably, the main content embodied into the legal certainty principle. The ability to predict all the legal consequences of any act or fact is the core of legal certainty since knowability and reliability find their basis on the calculability requirement.[279] The calculability is also known as the foreseeability requirement.[280] The requirement emphasizes the importance of foreseeability in allowing all subjects of the law to understand and adhere to legal norms "*to be able to plan their actions accordingly*".[281]

The previous three requirements highlight the large application of legal certainty, a general principle of EU law that covers both *ex-ante* and *ex-post* form of protection. Raitio has identified other different sub-principles that compose the legal certainty principle: "*the principle of non-retroactivity, protection of legitimate expectations, protection of vested rights, issues of procedural time limits and immediate application of the law, as well as the use of comprehensible language in the administration of the EU*".[282] In the same vein, Fuller confirms the composition of the principle in height sub-principle, which falls under the legal certainty principle that law is (i) promulgated, (ii) not retroactive (prospective), (iii) clear, (iv) relatively constant, (v) free from contradictions (vi) not imposing duties that are impossible to perform, (vii) administered in a way that does not wildly diverge from their obvious or apparent meaning, (viii) sufficiently general.[283] Gribnau has

[276] A. Davidson, *The Immutable Laws of Mankind*, (Springer Science, 2012).
[277] D. Popovic and S. V. Kostic, 'Legal Certainty and Taxation: The Problem of Retroactive Interpretation', (2018) 2018 Annals Fac. L. Belgrade Int'l Ed. 38.
[278] O. Green and others, 'EU Water Governance: Striking the Right Balance between Regulatory Flexibility and Enforcement?' (2013) 18 Ecol. Soc 10; Groothuijse and Uylenburg (n 4) 116–45; L. Squintani and H. van Rijswick, 'Improving Legal Certainty and Adaptability in the Programmatic Approach', (2016) Journal of Environmental Law, 28, 443-470.
[279] The difference between those concepts is that predictability take into consideration the quality of the data, contrary the calculability concept takes into consideration exclusively quantity data.
[280] L. Opet, Legal Certainty and Foreseeability of Court Decisions, Therotical Journal of the Questions of State and Law, Institute of State and Law of the Slovak Academy of Science, Právny obzor, 2008.
[281] Tridimas (n. 175)242; Raitio (n. 178); S. Bertea, *Certezza del Diritto e Argomentazione Giuridica*, (Rubbettino Ed. 2002), 57 ss.
[282] Raitio Ibid382. Maxeiner splits the legal certainty principle in similar components: legitimate expectations, law and decisions must be made public, law and decisions must be defined and clear, decisions of courts must be binding, retroactivity must be limited: See Maxeiner (n. 244).
[283] L. L. Fuller, *The Morality of Law*, (rev. ed. Yale University Press, 1969), 33-38; See Summers, Lon L. Fuller, p. 28. Although Fuller deals with these requirements in light of the principle of legality, these are all also aspects of legal certainty. *See* Gribnau (n. 143) 70.

listed similar aspects of legal certainty: (i) generality, promulgation, non-retroactivity, clarity, non-contradiction, and constancy.[284]

The legal certainty principle is often regarded as an "*umbrella principle*", covering several other sub-principles.[285] The CJEU jurisprudence confirms the multi-notion of the legal certainty principle, which is mainly composed by: (i)the predictability and clarity of the law, [286] (ii) the principle of legitimate expectations,[287] (iii) the non-retroactivity of EU legislation,[288] (iv) the principle of acquired (vested) rights,[289] (v) the requirement of procedural time-limits,[290](vi) and the demand for understandable language.[291] Similarly, the ECHR recognises the legal principle's multi-form by highlighting the requirement of accessibility[292], protection of *res iudicata*,[293] and foreseeability.[294]

In agreement with scholars, the CJEU and the ECHR, the Venice Commission of the Council of Europe provides a checklist to test the multi-element of the legal certainty: (i) is the law

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[284] H. Gribnau, 'Legal Certainty: A Matter of Principle', (2014) Tilburg Law School Legal Studies Research Paper Series, N.12/2014.

[285] Groussot, *General Principles of Community Law* (HH Lidgart, 2006), 24

[286] See Case C-169/80, Adm. *Customs/Gondrand Frères*, Jur., 1981, 1931 CJEU, 9 July 1981, Case C-257/86, *Commissionv Italy*, 1988, 3249, CJEU, 21 June 1988, Case C-143/93, *Van Es Douane Agenten*, Jur., 1996, 1-431. The case law entails particularly to the execution and implementation of European Union (EU) law by Member States must be sufficiently clear and precise in the light of the principle of the certainty of the law: See also Case C-143/83, *Commission vDenmark*, Jur., 1985, 427, CJEU, 15 June 1995, Case C-220/94, *Commission vLuxembourg*, 1995, 1-1589; Case C-308/06 *Intertanko* [2008] ECR I-04057; Case C-158/07 *Förster* [2008] ECR I-08507; Case C-110/03 *Belgium v Commission* [2005] ECR I-02801; Case C-201/08*Plantanol GmbH & Co KG v Hauptzollamt Darmstadt* [2009] E.C.R. I-8343 at [46]. Maduro argued that in a multilingual legal system as EU, this principle should not be considered as a sinonim of a semantic perfection. He used the notion of "incompletely theorized agreement". See P. Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', (2007) European Journal of Legal Studies, Vol. 1, (2), 1-21.

[287] Case 112/77 *Toepfer* [1978] ECR 1019, esp. 1032-1033, paras 18,19 and Case C-212-217/80 I [1981] ECR 2735, esp 2751, para 10; Case C-201/08 *Plantanol*, para 46.

[288] Case 98/78 *Racke* [1979] ECR 69, esp 84, para 15 and Case 212-217/80 *Salumi* [1981] ECR 2735, esp 2751, paras 9-10; C-201/08*Plantanol v Hauptzollamt Darmstadt* [2009] E.C.R. I-8343 at [53].

[289] Case 23/68 *Klomp* [1969] ECR 43, esp 50 and Case 10/78 *Belbouab* [1978] ECR 1915, esp 1924-1925; Case C-337/07*Altun v Stadt Boblingen* () [2008] E.C.R. I-10323 at [59] – [60]. The legal certainty principle also applies to administrative decisions that become final, and in principle, EU law does not oblige administrative bodies to reopen administrative decisions that become final. See Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* [2008] ECR I-00411, para 37.

[290] Case 59/70 *Netherlands v Commission* (*Steel Subsidies*) [1971] ECR 639, esp. 653, paras 15-19; Case C-3/59 *Germany v High Authority*, 1960, ECR 53, esp. 61.

[291] Case C-66/74 *Farrauto* I [1975] ECR 157, esp 162, para 6.

[292] *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, para 60.

[293] *Ryabykh v Russia* App no 52854/99 (ECtHR 24 July 2003) para 52; *Margushin v Russia* App no 11989/03 (ECtHR 1 April 2010) § 31; *Salov v Ukraine* App no 65518/01 (ECtHR 6 September 2005) para 93; *Protsenko v Russia* App no 13151/04 (ECtHR 31 July 2008) para 26; *Kravchenko v Russia* App no 34615/02 (ECtHR 2 April 2009) para 45; *Sutyazhnik v Russia* App no 8269/02 (ECtHR 23 July 2009) para 38. See also in same vein the CJEU case law: Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* [2008] ECR I-00411, para 37 f; Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-00837, paras 24, 27; Joined Cases C-392/04, C-422/04, i-21 *Germany v Bundesrepublik Deutschland and Arcor v Bundesrepublik Deutschland* [2006] ECR I-8559, para 51(f).

[294] Špaček, s.r.o., v. the *Czech Republic,* App no. 26449/95, para 57, 9 November 1999*; Centro Europa 7 S.r.l. and Di Stefano v. Italy [GC],* App no. 38433/09, § 143, ECHR 2012.

accessible? (ii) Are counts decisions accessible? (iii) are the effects of laws foreseeable?[295] (iv) are laws stable and consistent? (v) is respect for the principle of legitimate expectations ensured? (vi) is retroactivity of legislation prohibited? (vii) do the *nullum crimen sine lege* and *nulla poena sine lege* principles apply? (viii) is respect of *res judicata* ensured?.[296]

As can be observed, the principle of legal certainty is a general principle that cannot be limited to one of its sub-principles. This clarification will serve to test whether the GC and the EC have correctly interpreted the principle of legal certainty in its generality or whether we have limited it to one of its sub-principles.

2.4.4. Legal Certainty within the EU: There is Only one General Principle that Intervenes in All Legal Contexts and Legal Areas, Tax Law Included.

Legal certainty serves as a fundamental and versatile principle within EU legal framework, influencing the legislative process and guiding judicial review. Its impact is evident across various legal context, playing a crucial role in shaping the application and interpretation of EU law.[297] The main paradigms of legal certainty, such us foreseeability and clarity, remain unchanged regardless of the specific legal context. Five discernible legal contexts illustrate the principle' role in limiting the applications of EU law:[298] a) when legal certainty prevents validity of general norms,[299] b) when legal certainty prevents the applicability of general

[295] The Venice Commission cites the ECHR case *The Sunday Times v. the United Kingdom (No. 1),* App No 6538/74, 26 April 1979, § 49 where is stated that "*Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it*".

[296] European Commission for Democracy through law (Venice Commission), 'Rule of Law Checklist, (2013) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e, 25-28.

[297] P.M. Rodriguez, 'The Principle of Legal Certainty and the Limits to the Applicability', (2016) 52 Cahiers de. Droit Européen, 115.

[298] Ibid.

[299] Legal certainty requires law to fulfil certain conditions, such as clarity and precision and non-retroactivity. A legislative act that fails to fulfil them may see its validity contested. However, the judiciary must set a high standard of infringement, since legal certainty (like any other principle in a legal system) is not absolute. Most cases would not meet this standard and, when it comes to it, the Court usually shifts to other principles – particularly the proportionality principle - to ground the ruling. For example, in Digital Rights Ireland case, the Court quashed the directive on data retention with a legal certainty line of reasoning (precision and predictability) that easily fitted within the proportionality test. See Judgment of 8 April 2014 in Case C-293/12, *Digital Rights Ireland*, EU:C:2014:238, paras. 54-69.

norms,[300] c) when legal certainty precludes the interpretative effects over other norms,[301] d) when legal certainty prevents the redress of EU law infringements,[302] e) when legal certainty prevents the full consequences of EU law infringements.[303] Despite the seemingly erratic application, , the CJEU refers to the same case law to define the legal certainty principle, and the foreseeability requirement represent the core of the principle. This coherence underscore the generality of the legal certainty principle, emphasizing its binding nature on both member states when implementing EU law, and EU institutions, in every legal context and in every legal area, including tax law.[304] While specific variables may account for differences in application, the CJEU consistently applies substantive requirements such as predictability and non-retroactivity, demonstrating the enduring and foundational nature of the legal certainty principle within the EU legal order. [305]s.

The application of the legal certainty principle within tax law aligns with the general definition, emphasizing the clarity, precision, and predictability of rules. If we compare the definition of the legal certainty principle within the tax law area with the general definition, it appears that there are no two distinct legal certainty principles, one for the tax law and one for the other contexts. In general, the legal certainty principle "*requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situation and legal relationship*

[300] Within this legal context, legal certainty is placed outside the validity of law and it goes to the applicability of EU rules. The common application of the legal certainty principle the denial of direct effect to directives in horizontal situations. The issue is mostly related to the failure to publish measures properly in the Official Journal. The Court has refrained from ruling the measure invalid. Quite to the contrary, it has held the EU legal act concerned to be valid, focusing on its unenforceability against individuals. See Judgment in Case C-161/06 S*koma-Lux*, para. 32-38, and 58-60. Judgments of 4 June 2009 in Case C-560/07 *Balbino*, EU:C:2009:341, para. 31-32; of 29 October 2009 in Case C-140/08 *Rakvere Lihakombinaat*, EU:C:2009:667, para. 32-34; and of 12 July 2012 in Case C-146/11 AS Pimix, EU:C:2012:450, para. 40-42. Judgment of 20 June 2002 in C-313/99 Mulligan, EU:C:2002:386, para. 50-53.

[301] Within this legal context, legal certainty is relevant in interpreting norms particularly when it limits the obligation of consistent interpretation, be it in the form of banning *contra legem* interpretations where directives lack direct effect in horizontal cases (See e.g., Judgments of 30 April 2014 in Case C-26/13*Kásler y Káslerné Rábai*, EU:C:2014:282, para. 65) or in the form of precluding a directive (Judgment of 8 October 1987 in Case C-80/86 *Kolpinghuis Nijmegen*, EU:C:1987:431, paras. 13-14) or a framework decision (Judgment of 16 June 2005 in Case C-105/03 *Maria Pupino*, EU:C:2005:386, para. 44-45) from determining or aggravating criminal liability.

[302] The legal certainty applied in this functional context is legally conveyed through the annulment procedure. In this case, the legal certainty principle is applied to contest the validity or the enforceability of the legal act that redress the concrete EU law infringement. The principle protects final administrative decisions or *res judicata* once achieved. See Judgment in Case C-453/00 *Kühne and Heitz*, para. 24. Likewise, regarding *res judicata*, Judgment of 16 March 2006 in Case C-234/04, *Kapferer*, EU:C:2006:178, para. 20-21.

[303] This legal context is explicitly admitted in Article 264 TFEU. The scope of application is beyond the annulment procedure and the obviously analogous preliminary ruling on the validity of EU law, to interpretative preliminary rulings, or even infringement proceedings or actions for damages. See: Judgment of 6 November 2014 in Case C-335/13, *Feakins*, EU:C:2014:2343, para. 65; Judgment of 9 November 2010 in Case C-92/09, *Volker und Markus Schecke*, EU:C:2010:662, para. 93-94. See the seminal Judgment of 8 April 1976 in Case C-43-75, *Defrenne II*, EU:C:1976:56, para. 74; Judgment of 8 April 2014 in Case C-288/12, *Commission v Hungary*, EU:C:2014:237, para. 64.

[304] Judgment of 28 April 1988 in C-120/86, *Mulder v Minister van Landbouw en Visserij*, EU:C:1988:213, and of 11 December 1990 C-189/89 *Spagl*, EU:C:1990:450.

[305] One of the terms used is "*potentialité événementielle*" of the judicial decision (See J. Van Meerbeeck, *De la certitude à la confiance. Le principe de sécurité juridique dans la jurisprudence de la Cour de justice de l'Union européenne*, (Anthemis Université Saint-Louis, 2014), 496-497.

governed by EU law".[306] Within tax law, the legal certainty principle "*requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly*".[307] There are no two distinct principles of legal certainty, but there are subtle peculiarities related to the manner that legal certainty is protected by the EU Treaty, developed by the CJEU and how it is safeguarded by the Constitution of each member states in the sphere of tax law and the nature of the relationship between all these rules.[308]

The concept of legal certainty in tax law does not differ from the general concept of legal certainty, although it highlights the protective character.[309] The CJEU has stressed that the principle of legal certainty is all the more prominent, when the measure at issue is capable of having financial consequences[310]; and tax law matters have financial consequences.

2.4.5. Distinction between Legal Certainty and Legitimate Expectations: Different Conditions Must be Satisfied to the Claim Entitlement of their Protection.

The distinction between legal certainty and the legitimate expectation principle is not an aseptic doctrinal contribution, rather, it holds practical significance as distinct conditions must be satisfied to invoke the protection of each principle. This distinction becomes particularly crucial in the context of the recovery of unlawful State aid, which can be not required if the recovery is contrary to any general principle of law, such as the principles of legitimate expectations and legal certainty. Both member states and MNEs affected by the decisions of the recovery of fiscal State aids granted via tax rulings have alleged both principles in their opposition to the aid recovery.

In this regard, this section will serve as the foundation to support the argument that the GC and the EC propose counter-arguments to deny the legal certainty protection by conflating the legitimate expectations principle and the legal certainty principle. This misapplication of the legal certainty principle could be strategically applied, as the precise assurance is one of the conditions that must be satisfied for the legitimate expectations, which is not required for the legal certainty protection. In doing so, they have deprived member states and MNEs of the protection of the legal certainty principle.

This section is structured as follows: First, we provide an overview of the literature covering the differences between legal certainty and legitimate expectations. Secondly, we provide a

[306] Case C-48/14, *Parliament v Council*, EU:C:2015:91, para 45.
[307] Case C-169/80, *Administration des Douanes, and SA Gondrand Frère, SA Garancini*, para 17.
[308] Dourado (n. 199)30-31.
[309] Novoa (n. 198)91, 104.
[310] See *inter alia* Case C-345/06 *Heinrich* ECLI:EU:C:2009:140 [2009] ECR I-1659, para 27.

definition of the legitimate expectation according to the CJEU jurisprudence. Subsequently, we highlight the similarities between the two principles, and finally, we present the CJEU case law where only legal certainty protection was claimed. The examination of the case law where the legal certainty principle has been claimed alone (without the concurrent claim of the legitimate expectation) is: (i) a way to highlight differences and similarities between the two EU principles, (ii) a *prima facie* demonstration that legal certainty and legitimate expectations do not coincide.

The overview of the literature reveals that this section is not the first attempt to underscore the distinction between the principles of legal certainty and legitimate expectations. Generally, legal literature tends to approach legal certainty by stressing the connection with the principle of legitimate expectations.[311] Schwarz asserts that the difference between legal certainty and legitimate expectations remains unclear.[312] Craig adopts a more specific stance, arguing the importance of clarifying that legal certainty and legitimate expectation do not coincide.[313] Van Meerbeek contends that legitimate expectations have devoured the overarching principle of legal certainty in all its expression of vested rights, revocation of administrative decisions, law retroactivity, legislative changing or duty to act within a reasonable time.[314] Rodriguez underscores their strict connection, asserting that individuals must be able to expect that public authorities and individuals abide by the law, allowing them to predict the effect of law based on that fact.[315] Gribanau states that within the legal certainty principle, legitimate expectations are viewed as the trust or certainty of people that "*law will be chosen, changed and developed, and interpreted in an overall principled way*".[316] Ahmentaj argues that legal certainty and legitimate expectation are two distinct principles, [317] with the former rooted in the temporal dimension and retroactivity, while the latter is grounded in the concept of the good faith. Raitio confirms the same view that under EU law, the legal certainty principle is not limited to the legitimate expectation principle but it refers to a broad principle that covers "*the principle of non-retroactivity, protection of legitimate expectations, protection of vested rights, issues of procedural time limits and immediate application of the law, as well as the use of comprehensible language in the administration of the EU*".[318] Schermers and Waelbroeck endorse the idea of legal certainty as an umbrella principle divided

[311] E.g., P Craig and G. de Burca, *EU Law; Texts, Cases and Materials* (5th ed., Oxford University Press, 2008), 551-558; and J. A. Usher, *General Principles of EC Law* (Longman, 1998), 52-71. S. Schonberg, *Legitimate Expectation in Administrative Law* (Oxford University 2000).

[312] J. Schwarze, *Droit administratif européen*, (2ème Edition, Bruylant, 2009),1000.

[313] Other books and articles emphasise the often mislead assimilation between the legal certainty and legitimate expectation: P. Craig, *EU Administrative Law*, (2nd edition, OUP, 2012), 549 – 589.

[314] J. Van Meerbeeck (n. 291)19-20.

[315] Rodriguez (n. 283).

[316]Gribnau (n. 143) Similarly, see also R. Dworkin, *Law's Empire* (Harvard University Press, 1986), 214-227.

[317] H. Ahmentaj, 'Legal Certainty and Legitimate Expectation in the EU Law', (2014) Interdisciplinary Journal of Research and Development, Vol (I), No.2, 345-346.

[318] Raitio (n. 178), 382. Maxeiner splitted the legal certainty principle in similar components: legitimate expectations, law and decisions must be made public, law and decisions must be defined and clear, decisions of courts must be binding, retroactivity must be limited: See Maxeiner (n. 244).

into sub-categories, with legitimate expectations being one of them.[319] Tridimas shares a similar perspective, considering the principle of the protection of legitimate expectations as a specific case of the principle of legal certainty.[320] In the same vein, Groussot affirms that legal certainty is an "*umbrella principle*" as it gathers together several other principles, including the principle of legitimate expectations.[321] The Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, in a published a report, asserts that the main legal foundations of the principle of legitimate expectations are found in the rule of law and in the principle of legal certainty.[322] The EU Venice Commission's questions to verify the full application of the legal certainty principle is a valid method since the Venice Commission report is based on the CJEU case law. For instance, the question: "*are the effects of laws foreseeable*?" does not coincide with the question: "*is respect for the principle of legitimate expectations ensured*?". Gormsen and Mifsud-Bonnici apply a foreseeability test, distinctly separating the principle of legal certainty from the principle of legitimate expectation.[323] In their article, the legal certainty assessment is linked to the foreseeability of complex EU law (and the heavy influence of quasi-legislative activity by the CJEU). Under such circumstances, individuals may find themselves unable to determine the applicable law. In contrast, "*the principle of legitimate expectations encompasses all situations where legal subjects reasonably rely on the persistence of a legal situation influenced by EU institutions. While one might see a strong connection to the principle of non-retroactivity, the practice of the EU courts seems to put more emphasis on whether or not individuals reasonably relied on circumstances influenced by EU law"*.[324] Moreover, according to the former President of the CJEU, Mertens de Wilmars, "*there has been a tendency to confuse the principle of acquired rights with the principle of protection of legitimate expectations, both of which are elements of the principle of legal certainty*".[325]

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[319] H. G. Schermers and D. Waelbroeck, *Judicial Protection in the European Union* (6th ed., Kluwer Law International, 2001), 64-87. Raitio (n. 178)125, who considers the principle of legal certainty as a 'multi-faceted principle'. J. Temple Lang, 'Legal Certainty and Legitimate Expectations as General Principles of Law', in U. Bernitz et al., (eds)., *General Principles of European Community Law*, (Kluwer Law International, 2000), 164 who uses the term '*umbrella principle'*.

[320] Tridimas (n. 175), 163.

[321] Groussot (n. 271)24.

[322] ACA Europe, *La Protection de la Confiance Légitime en Droit administratif et en Droit de l'Union Européenne*, Rapport Général, Avril 2016. In another Report, ACA EU has affirmed that the principle of legitimate expectations is an "autonomous manifestation" of the rule of law. See ACA Europe, *The Protection of Legitimate Expectations in Administrative Law and EU Law*, German Report, April 2016.

[323] L. L. Gormsen and C. Mifsud-Bonnici, 'Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advance Pricing Agreements on Tax', (2017) Journal of European Competition Law & Practice, Vol.8, No. 7, 789-795.

[324] Ibid.

[325] J. Mertens de Wilmars, 'The Case-law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed Economy-Systems' [1982] Legal Issues of European Integration 15-16. The distinction between acquired rights and legitimate expectations can also be illustrated by comparing the Cases C-309/89 *Codorniu* [1994] ECR 1-1853 (acquired rights) and C-26/86 *Deutz und Geldermann* [1987] ECR 941 (legitimate expectations). See also Case C-100/74 *C.A.M* [1975] ECR 1393, esp 1404, para 30, where there are expressions in the judgments of the CJEU which appear to confirm his opinion: "*The applicant lastly claims that the contested provision infringes the vested rights which it possesses under Article 16 of Regulation No. 120/67 (...,) or at least the legitimate expectation which it was entitled to have in the continuance of these rules for the future*".

The prevailing view among academics on these topics supports the idea that legal certainty is an "*umbrella principle*" in which legitimate expectations is contained. If we take the position that the legal certainty principle is an "*umbrella principle*", it becomes challenging to assert that the legal certainty principle (as an umbrella principle) coincides or is limited to one of its sub-principles (namely, the legitimate expectations principle). Consequently, some contents overlap, as the legitimate expectations principle is not entirely separated from the legal certainty principle.

Before delineating the areas of overlap and distinction, it is valuable to present how the legitimate expectations principle is understood under EU law. The EU Treaties do not explicitly define the legitimate expectations principle. Pursuant to the established CJEU case law, the protection of legitimate expectations is one of the fundamental principles of the EU.[326] The CJEU has stated that the legitimate expectation principle is "*a corollary*" of the principle of legal certainty, which requires that legal rules be clear and precise, and it aims to ensure that the situations and legal relationships governed by EU law remain foreseeable.[327] The EU principle of legitimate expectations is limited to the protection of the legitimate trust created by the conduct of EU authorities.[328]
Not all expectations are protected under the principle, but only those expectations that fulfil certain conditions. The CJEU has defined and listed the restricted conditions in *Branco*: "*First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the community authorities. Secondly, those assurances must be such give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules*.[329]
Pinto has succinctly summarized these conditions, stating that: i) The private actor has to be assured objectively that the planned measure is compatible with the internal market, ii) the prudent and diligent businessman could not have been able to foresee the incompatibility of the aid, iii) there has to be an objective prevalence of the private interests over the public ones.[330]

Firstly, the condition of a "*precise assurance*" shall be meet to seek for the legitimate expectation principle protection.[331] According to the CJEU, such assurances must be "*precise, unconditional, and consistent information*" originating from "*authorized and reliable source*".[332] In *Forum 187* case, the CJEU states that "*the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community authority has caused him to entertain expectations which are*

[326] See *inter alia* C-369/09 P, *ISD Polskaand Others v. Commission*, ECLI:EU:C:2011:175, para. 122.
[327] Judgment of the Court of Justice of the European Communities (Sixth Chamber) of 15.2.1996, C-63/93, *Duff and Others.*, ECR 1996, p. 1-00569, para. 20.
[328] The EU legitimate expectations principle is considered an autonomous notion. See: A. Giraud, 'A Study of the Notion of Legitimate Expectations in State Aid Recovery Proceedings: '*Abandon all hope, ye who enter here'?',* (2008) CML Rev., vol. 45, 1404. C.S. Pinto, 'The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations: A Hopeless Clash as an Opportunity for Convergence?'(2016), EStAL*,* vol. 2, 273.
[329] Case T-347/03 *Branco v Commission* (2005) ECR II-255, para 102.
[330] Pinto (n. 314)274.
[331] E. Fink, 'The Possibility of Protection of Legitimate Expectations in Recovery of Unlawful State Aid', (2013) 20 Juridica Int'l 133.
[332] Case T-271/04, *Citymo v Commission*, EU:T :2007 :128, para 138.

justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration".[333] The "*precise assurance*" standard has been used by both CJEU and EC. For example, in the *Belgian Coordination center* case, it was the EC, not the EU courts, that applied the legitimate expectations doctrine. Taxpayers are relying on an act of the EU institution rather than directly on the law itself.

Secondly, the "*diligent business person*" standard is another condition for evaluating whether taxpayers legitimately expected that the "*precise assurance*" provided by an administrative act was valid and legal. A diligent business person should have been able to determine that the administrative act was procedural and substantially compliant. It is a strict standard since the taxpayer shall second-guess the action of its own government, determine whether it is compliant under EU.[334] It seems that the diligent business person test is added to the "*good faith*" standard.[335] The CJEU held that '*the error made* [by the competent authorities] *must be such that the person competent, acting in good faith, could not reasonably have been able to detect it in spite of the professional experience and exercise of due care required of him*.'[336] Even the good faith reliance should be deprived since a diligent business person should have been able to evaluate rather the act is compliant with EU law. In order to determine whether the act is compliant, account must be taken the nature of the error, the professional experience of the person concerned, and the degree of care which they exercised. [337]

Lastly, the legitimate expectations of individuals must be proportionally balanced against the public interest, a test commonly known as the proportionality test.[338] Public interest is often invoked to balance the interests of the private against other public interest proportionally.[339] Only where there is no significant individual interest may a public interest of retroactivity

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[333] Joined cases C-182/03 and C-217/03, *Forum 187*, para. 147 (citing case C-506/03, *Germany v. Commission*, ECLI:EU:C:2005:715, para. 58).

[334] R. H.C. Luja, 'EU State Aid Control: Balancing Tax Benefits and Fair Competition in Pursuit of an Internal Market', Proposal of the European Parliament and of the Council on foreign subsidies distorting the internal market, *Comparative Fiscal Federalism*, (2d ed., 2016), at section 5.04 B[4][C] (quoting the view of the Court of Justice that "*undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in [TFEU art. 108]. A diligent businessman should normally be able to determine whether that procedure has been followed*."

[335] R. Mason, 'State Aid Special Report, Part.2, Legitimate Expectations', (2017) Law and Economics Research Paper Series 2017-17. See also European Commission, Information Paper on the Application of Articles 220(2)(b) and 239 of the Community Customs Code. Council Regulation (EC) n°450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code), *OJ* L 145/1. Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, *OJ L 269,* Art. 119.

[336] C-251/00*Ilumitrónica - Iluminação e Electrónica Ldª v Chefe da Divisão de Procedimentos Aduaneiros e Fiscais/Direcção das Alfândegas de Lisboa, and Ministério Público*, EU:C:2002:655 para 38.

[337] Joined cases C- 153/94 and C-204/94, *The Queen v Commissioners of Customs & Excise, ex parte Faroe Seafood Co. Ltd, Føroya Fiskasøla L/F and Commissioners of Customs & Excise, ex parte John Smith and Celia Smith trading as Arthur Smith* (a firm), EU:C:1996:198, pt. 106.

[338] Case C-98/78 *Racke* ECLI:EU:C:1979:14, para 20. See also Case C-99/78 *Decker v Hauptzollamt Landau* ECLI:EU:C:1979:15 [1979] ECR 0101, para 8; Joined Cases C-212 to 217/80 *Meridionale Industria Salumi and Others* ECLI:EU:C:1981:270 [1981] ECR 2735, para 10.

[339] Case C-459/02 *Gerekens and Procola* ECLI:EU:C:2004:454 [2004] ECR I-7315, para 23; Case 224/82 *Meiko* ECLI:EU:C:1983:219 [1983] ECR 2539, para 12.

prevail. The proportionality test is a commonality of both principles since they are never applied in absolute, but are balanced against other principles. [340] Colliding principles makes evident which values are really at stake at a deeper level. The legal certainty principle is usually balanced against the legality principle.[341] Legal certainty and legitimate expectations are also balanced against the equality principle.[342] In the case of improper application of tax rules, legal certainty may constitute an argument not to change the law, and legal equality and the ability-to-pay principle may constitute an argument to change the law. According to Dworkin, in order to resolve the conflict between colliding principles, one has to consider the relative weight of each. [343]

Having provided the definition and the conditions required by the legitimate expectation principle, and having defined the legal certainty principle in the previous section, this section analyses cases where legitimate expectations is not claimed. Usually, legal certainty and legitimate expectations principles are pleaded conjointly. Therefore, it is difficult to distinguish the inherent future or the different condition required to successfully claim their protection. Since the purpose of this section is to highlight the difference between the two EU principles, it is relevant to look into the case where the legitimate expectation is not pleaded at all, and only the legal certainty is at stake.[344]

For example, in *Administration des Douanes and SA Gondrand Frèrres and Garancini*, the CJEU upheld that the rule in question is "*obviously unclear*" as is apparent inter alia from the fact that even the competent customs authorities originally interpreted it. When the protection of the legal certainty is pleaded alone, there is no expectation or reliance on the enforcement authority.

The legal certainty protection has been the core of other tax cases under the scrutiny of the CJEU preliminary ruling cases.[345] In several CJEU tax cases, the legitimate expectations

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[340] Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland* ECLI:EU:C:1997:163 [1997] ECR I-1591, para 34 et seq.

[341] Case C-402/11 P, *Jager & Polacek v HABM* [2012]; Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, para 68.

[342] As regards the balance between legal certainty and equality cf.: J. Pontier & E. Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters according to the Case Law of the European Court of Justice* (T.M.C. Asser Press, 2004), 12ff. As regards the balance between legitimate expectation and equality cf.: F. Chaouche, *Legitimate Expectations in Luxembourg Tax Law*, (Larcier, 2019).

[343] R. Dworkin, *Taking Rights Seriously* (Duckworth, 1977), 26-27.

[344] The legal certainty principle was first acknowledged in 1961, 3 years before the first acknowledge of the legitimate expectation principle. C- 42/59 *Société nouvelle des usines de Pontlieue—Aciéries du Temple (SNUPAT) v High Authority* [1961] E.C.R. 103. The first CJEU case with a reference to the legitimate expectation principle is C-111/63, *Lemmerz-Werke GmbH v High Authority of the ECSC*, EU:C:1965 :76

[345] Member States have pleaded legal certainty within the temporal effects of judicial decision of CJEU. See: T. Koopmans, 'Retrospectivity Reconsidered', (1980) 39 CAMBRIDGE L.J. 287 ; Michael Lang, 'Limitation of the Temporal Effects of Judgments of the ECJ', (2007) 35 INTERTAX 230 ; Roman Seer, 'The Jurisprudence of the European Court of Justice: Limitation of the Legal Consequences?', (2006) EUR. TAX'N 470; M. Waelbroeck, 'May the Court of Justice Limit the Retrospective Operation of its Judgments?', (1981) 1 Y.B. EUR. L. 115; Ariane Wiedmann, 'Non-Retroactive or Prospective Ruling by the Court of Justice of the European Communities in Preliminary Rulings According to Article 234 EC', (2006) 5/6 EUR. L.F. 197. The CJEU, upon request of the national courts of Member States, it gives ruling on cases that relate on any aspect of EU law. CJEU has competence for infringement proceedings, judicial review of EU

protection has not been pleaded.[346] The domestic court referring the case to the CJEU has to decide whether a provision of its domestic law complies with or infringes Union law. The issue of retroactivity is not just limited to the source, but it can also be viewed from the content perspective.[347] The content of legal certainty is related to the possibility of clearly interpreting a particular law. In principle, the CJEU interprets Union Law and (at least in its own perception) does not create Union Law. The CJEU interprets the law as it is, and always has been (retrospectively).[348] Thus, CJEU judgments usually have an automatic retroactive effect. However, the CJEU is aware that this approach may have side effects as regards legal certainty. In 1976, the CJEU decided to limit the temporal effects of one of its judgments.[349] The scope for such exceptions to the rule is limited under strict conditions: "*It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relations established in good faith".* [350]

In *Bautiaa and Société Francaise Maritime,* the Court summarised the conditions related to legal certainty principle: "*The Court has taken such a step only in certain specific circumstances, for instance where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force, and where it appeared that both individuals and national authorities had been prompted to adopt practices which did not comply with Community law by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other member states or the Commission may even have contributed.*"[351] The two main criteria were recited more briefly in *Vroege*: "*that those concerned should have acted in good faith and that there should be a risk of serious difficulties*".[352]

The first criterion is "*objective legal uncertainty*", strictly connected with the concept of good faith.[353] The legal relationships affected must have been entered into good faith on the basis

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legislative and executive acts, and it has also competence for reviewing the legality of all acts producing legal effects: see Arts 230 and 263 TFEU.

[346] When Government invoked the protection of the legitimate expectation in support of a request to limit temporal effects of a judgment, the CJEU affirmed that legitimate expectation is "generally" relied upon individuals in a situation where they have legitimate expectations created by the public authorities. The principle of legitimate expectations cannot be relied on by a government. See *inter alia* Case C-177/99, *Directeur des Services Fiscaux de Maine-et-Loire, and others*, ECR I-3625, para 67.

[347] The norm itself remained static and we cannot refer either retroactivity or retrospectivity of tax legislation in their proper sense. Retroactivity is considered a situation where a law is applied to a taxable event that had occurred before the law entered into force. Retrospectivity refers to the situation where a law is being applied to the future consequences of a taxable event that had occurred before the law entered into force. See Popovic and Kostic (n. 263).

[348] Case C-262/96 *Sürül v Bundesanstalt fur Arbeit* [1999] ECR I-2685, [2001] 1 CMLR 4 at para.107: "the interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC (ex-Article 177), the Court gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force.

[349] Case C- 43-75 *Defrenne v Sabena* [1976] ECR 455, para 69 et seq.

[350] Case C-292/04, *Meilicke* [2007] ECR I-1872, para 35 et seq. Case C-104/98 *Buchner and Others* [2000] ECR I-3625, para 39.

[351] Joined cases C-197/94 and C-252/94 *Bautiaa and Société Francaise Maritime* [1996] ECR I-505, para.48.

[352] Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV* [1994] ECR I-4541, [1995] 1 CMLR 881, para.21

[353] A. Wiedmann, 'non-retroactive or prospective ruling by the Court of Justice of the European Communities in preliminary rulings according to Article 234 EC', (2006) The European Legal Forum (E) 5/6-2006, 197-203.

of rules considered to be validly compliant with EU law. [354] Thus, it must be apparent that both individuals and national authorities had been led into adopting practices that do not comply with EU law by reason of "*objective, significant uncertainty*" regarding the implications of EU provisions.[355] It is often challenging for both private parties and the member states to know what the Court allows, and what it will be rejected. The objective legal uncertainty test is a quasi-impossible task. Under this test the CJEU considers (although it is not decisive) if the case at stake is the first time the question is viewed.[356] On the contrary, the CJEU rejects the assumption of uncertainty when there is well-established case law on a certain EU provision.[357] The law is taken as a reference to test the level of uncertainty, and the CJEU jurisprudence is taken as a source of certainty and clarification. In rare situations, the CJEU case law can also create legal uncertainty.[358]

The eventual conduct of EU institutions that have contributed to the confusion may or may not relevant. Within the legitimate expectation principle, "*precise assurance*" is required as a condition to claim its protection. However, the other EU authorities play a role regarding the "*good faith*" requirement. Good faith can especially be generated by the conduct of the EC and the other member states. For example, the EC practices have been considered to be sufficient (without requiring the precise assurance test).[359] In this case, the EC's inertia has contributed to the creation of legal uncertainty.[360]In other cases, the EC's role was "*more*" active. In *Blaizot*, the CJEU consider relevant "letters sent by the EC to Belgium".[361] In *EKW*, an unchallenged issue during the negotiation with the Austrian government was considered sufficient to generate legal uncertainty.[362] In *Societe Regie Networks*, a tax case in the State aid area, it was a contested EC decision, which contributed sufficiently to the uncertainty. In "*particular, the fact that the aid scheme at issue was notified to the Commission and the decision by which the latter authorized that scheme was not challenged before the Community judicature are capable of justifying the imposition of a limitation on the temporal effects of the declaration that the contested decision is invalid.*"[363] In the previous cases, the MS or taxpayers that entered into legal relationship established in good faith by relying upon the previous interpretations.

Besides the "*objective legal uncertainty*" and "*good faith*" or the successful application for a limitation *ratione temporis,* the criterion of interconnection must be fulfilled. The interconnection is intended as the interconnection between the primary ruling and the dictum

[354] Case C-169/80, *Administration des Douanes, and SA Gondrand Frère, SA Garancini*, para 18. See also Case C-143/93, *Gebroeders van Es Douane Agenten BV, and Inspecteur der Invoerrechten en Accijnzen*, ECR I-343, para 25.
[355] C- 24/86 *Blaizot*, [1988], I-379, para 28; C- 309/85 Barra, [1988], ECR I-355, para. 14.
[356] Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV* [1994] ECR I-4541, [1995] 1 CMLR 881 para 24.
[357] Case 61/79, *Denkavit Italiana* [1980] ECR 1205, Para. 21; Case C-57/93, *Vroege* [1994] ECR I-04541, paras. 28-30; Joined Cases C-367/93 to C-377/93, *Roders and others* [1995] ECR I-02229, Para. 45; Case C-415/93, *Bosman* [1995] ECR I-04921, Para. 146; Case C-104/98, *Johann Buchner* [2000] ECR I-3625, para. 40.
[358] Case C-262/96, *Sürül* [1999] ECR I-2685, para. 110.
[359] Case C-43/75, Defrenne *II*, [1976] ECR I-455, para. 74.
[360] See similarly Case C-577/08, *Brouwer*, [2010] ECR I-7489, para 39.
[361] Case C-24/86, *Blaizot v Université de Liège* [1988] ECR 379, para. 32 et seq.
[362] Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, para. 56.
[363] Case C-333/07, *Société Régie Networks* [2008] ECR I-10807, para 123.

temporarily limiting the effects.[364] The CJEU requires a high degree of similarity between the relevant questions for interpretation.[365] Since the good faith requirement is present in both legal certainty and legitimate expectations principle, it is relevant to distinguish the criterion of interconnection from the criterion of good faith, which is tied to the existence of objective uncertainty in respect of the implications of Community provisions. Under the good faith requirement, a series of factors can contribute to such uncertainty, namely the conduct of the EU institutions (i.e. EC, Council, CJEU), and other member states. In contrast, the criterion of interconnection solely refers to a ruling of the CJEU previous to the proceedings at hand.[366]

Although it is not decisive, the "serious economic repercussion" is the last that can be required.[367] This serious economic repercussion can be suffered by both private undertakings and governments. In *Defrenne*, the CJEU made it clear that financial consequences which might ensue for a member state from a preliminary ruling do not in themselves justify the limitation in time of the effects of a preliminary ruling. Otherwise, the most serious infringements would receive more lenient treatment, as those infringements are likely to have the most significant financial implications for the member states. Furthermore, to limit the effects of a judgment solely on the basis of such considerations would considerably diminish the judicial protection of the rights which taxpayers have under EU fiscal legislation.[368]

Regarding all criteria, the burden of proof regarding the fulfilment of all conditions lies with the member states.[369]

In conclusion, differentiating legal certainty from legitimate expectations is not an easy task. Scholars are divided about the possible differentiation since the erratic interpretation of the EU courts seem to avoid a firm clarification of the differences between the two principles. Very few cases have expressly delineated the difference. In the *Salzgitter* case, the GC distinguished between the two principles: "*However, the applicant is not pleading a legitimate expectation that aid was properly granted but rather a breach of the principle of legal certainty, a matter which does not depend solely on the conditions required for the creation of a legitimate expectation on the part of the recipient of the aid*".[370] The Court states that the differentiation of legal certainty and legitimate expectations is based not only on their content, but also on the conditions that have to be fulfilled in order to claim their protection. Effectively, their differentiation is relevant because

[364] C-437/97 – *EKW*, [2000], ECR I-1157, para. 57.
[365] AG Stix-Hackl, ECJ 5 October 2006 inC-292/04 *Meilicke*, para 21.
[366] Wiedmann (n. 339).
[367] The ECOFIN Council has fixed in its agenda "*action to be taken in the light of the judments of the Court of Justice concerning taxation*". Press Release of the 2,638th Council Meeting, February 17, 2005, 6141/05; see also the Press Release of the 2,666th Council Meeting, 9202/05: "Over lunch, Ministers discussed the budgetary impact of judgments delivered by the Court of Justice in the field of taxation.". See also T. Lyons, 'A Drive to Curb the Power of the ECJ?' [2005] BTR 449.
[368] C-137/94 *Richardson*, [1995], ECR I-3407, para. 37; C-367/93 to C-377/93 *Roders et al.*, [1995], ECR-I-2229, para. 48; C-184/99 *Grzelczyk*, [2001], ECR I-6193, para 52; Case 43/75 Defrenne *II*, [1976] ECR I-455, paras 74/75; C-163/90 Legros *et al.*, [1992], ECR I-4625, para. 30; C-262/96 Sürül, [1999], ECR I-2685, para. 108; C-209/03 Bidar, [2005], ECR I-2119= [2005] EuLF I-111, para. 67.
[369] C- 197/94 and C-252/94 Bautiaa *and Société française maritime*, [1996], ECR I-505, para. 50
[370] Case T-308/00, *Salzgitter AG*, Judgment of 1.7.2004, EU: T:2004:199, para. 166.

different conditions must be satisfied, in order to claim entitlement of the protection of the legal certainty principle compared to the protection of the legitimate expectation principle.

The principle of legal certainty requires that the EU legislation must be certain and its application foreseeable by those subject to it.[371] As regards the principle of protection of legitimate expectations, the Court recalls that it is settled caselaw that this principle cannot be invoked, unless the person concerned has been given *"precise assurances"* by an institution and a *"prudent and alert economic operator"* could not have foreseen the adoption of the contested measure.[372] The "*precise assurance*" requirement is absent under the legal certainty principle.
The requirement to foresee the legal consequence of facts and acts means the capacity to predict the limits of state intervention mainly in one's acts, through prior knowledge of the state's discretionary powers. In other words, the ability to control the alternative meanings of future normative interpretations and, therefore, the possible decisions of the bodies that enforce the law.[373]
The clarity dimension of the legal principle is not considered by the legitimate expectation principle.[374] As we have seen in the previous section, clarity is not restricted to the formal requirement of the publication but also to the content of the law in order that its application should be foreseeable.[375] We can affirm that legal certainty have two dimensions: one mainly focused on retroactivity and the other on clarity. Both of them are deployed to make law and its application foreseeable.

Under the legal certainty protection, a government or individual – since legal certainty protection covers both of them – is not relying on the foreseeability of the effect of the interpretation of the enforcement authority, such as EC or tax authority, but it is relying on the foreseeability of the effect of law directly. The enforcement authority is able to propose its interpretation of the law to the CJEU. The CJEU can confirm or not the enforcement authority's interpretation. In case of confirmation, and in case the CJEU's interpretation (which coincides with the enforcement authority) is foreseeable, the taxpayer is not relying on the precise assurance of the enforcement authority or in its previous practice, but directly upon the CJEU, which is giving new content to the law, or a new extended unforeseeable aw effect. Under the CJEU jurisprudence on legal certainty, the taxpayer has the "*right to rely upon a provision*" rather than upon an act of the enforcement authority.[376] In the case of legal certainty protection, the taxpayer is not protected against the misleading conduct of public authorities, but will be protected against the unforeseeable effect of law as interpreted by the CJEU. In the case of legal certainty, the link with the law is direct. On the contrary, in the case of legitimate expectations, the link with law is indirect via the enforcement authority.

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[371] Case C-81-10 P, *France Télécom SA v European Commission*, EU :C :2011 :811, para 100 ; C-372/97, *Italy v Commission*, EU : C.2044 :234, paras 116-118.
[372] Case C-67/09P (Nuova Agricast and Cofra v Commission, ECLI:EU:C:2010:607 para. 71. See also Joined Cases C-182/03 and C-217/03 Forum 187 v Commission, ECLI:EU:C:2005:266, para. 147.
[373] S. Calmes, *Du principe de protection de la confiance légitime en Droits Allemand, Communautaire et Français*, (Dalloz, 2001), 159 ; G. Gometz, *La certezza giuridica come prevedibilità*, (Giappichelli, 2005), 13, 208, 224.
[374] Cf. 2.4.3.
[375] See Case C- 345/06, *Heinrich*, Judgment of 10 March 2009. See also Ahmentaj (n. 303).
[376] Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 39, and Linneweber and Akritidis, para 42.

To conclude, we can support the argument that the legitimate expectations principle is "*a corollary*", but not "*the corollary*" of the legal certainty principle.

2.4.6. Partial Conclusion

The legal certainty principle in EU law holds a high status as a fundamental principle, standing on the same level as primary EU law. The CJEU has emphasized that legal certainty is a crucial component of EU law and it applies across all legal areas and contexts. There is not a separate set of principles for legal certainty, but rather one principle that applies universally. However, legal certainty cannot be limited to just one of its sub-principles, such as the legitimate expectations principle. Legal certainty and legitimate expectations have different requirements and conditions, and they cannot be considered as equivalent. Therefore, it is important to differentiate between the two principles and understand their specific requirements and conditions.

2.5. The EU Institution's Ability to Reduce Legal Uncertainty

2.5.1. Introduction

Clarity and predictability stand as two of the undisputable requirements of the legal certainty principle. In this regard, we argue that only the CJEU has the capacity to enhance legal certainty. Lang previously argued that EC and member states can only contribute to legal uncertainty.[377] In this section, we support the same idea by adding that only CJEU can provide legal certainty. However, it is noteworthy that the EC cannot offer legal certainty; instead, it can provide legitimate expectations.

In this thesis, the analysis of how EU institutions can contribute to legal certainty serves as a clarification of their power and competence, and it represents a way to highlight the distinction between legal certainty and legitimate expectation. This distinction becomes particularly relevant when, in the next Chapter, the *ex-post* protection provided by the legal certainty principle will be evaluated in light of the effective capabilities of EU institutions to provide legal certainty within the State aid law framework.

[377] Lang (n. 330).

2.5.2. The CJEU Contribution to Legal Certainty: The Moment of Certainty

The Court of Justice of the European Union (CJEU) was established under the ECSC Treaty in 1952.[378] The CJEU has the exclusive responsibility that EU legislation is interpreted and applied in the same way in all EU countries, so that the law is equal for everyone.[379] Art. 220 of the EU Treaty stipulates that "*the Court of Justice shall ensure that in the interpretation and application of this treaty the law is observed*".[380] The CJEU enforces treaty provisions as well as regulations, directives, and decisions made by the EC and the Council.[381] The CJEU also has the duty to "*states what that law is when the Community provisions do not explicitly provide the answer*".[382] The most common cases handled by the CJEU are as follows: a) references for a preliminary ruling; b) actions for failure to fulfil an obligation; c) actions for annulment; d) actions for failure to act.[383]

As previously argued, although uncertainty is inherent in the law, one moment of certainty is still present. This moment arises when the court of the last instance upholds a tax position. [384] Given that the CJEU is the court of last resort in the EU, legal certainty is achieved after the CJEU judgment, when all possible interpretations will be reduced to only one "*certain*" solution.[385] In line with the existing literature, the Directorate-General for Taxation and Customs Union, in 2017 published its research on tax uncertainty,[386] defining it as the period "*until courts emit the final verdict the case remains open and taxpayers remain uncertain on what the correct behaviour should be*".[387] Similarly, the European Court of Human Rights points it out that "*where*

[378] Treaty establishing the European Coal and Steel Community, ECSC Treaty 1951. Along with the Court of Justice, the General Court is one of the EU's courts making up the Court of Justice of the European Union. The purpose of these courts is to ensure a uniform interpretation and application of EU law. Decisions of the General Court can be appealed to the Court of Justice, but only on a point of law.

[379] J. Odermatt, The Court of Justice of the European Union: International or Domestic Court, 3 Cambridge J. Int'l &Comp. L. 696, 2014.

[380] Art. 220 TEU.

[381] N. Stewart, 'The Relationship Between the European Court of Justice and the Courts of the Member States of the European Communities', (1992) 5 Int. L. Practum 41.1.

[382] P.S.R.F. Mathijsen, A *Guide to European Community Law*, (4th Rev ed, Sweet & Maxwell 1985).

[383] See Arts. 267 (2), 258, 259,260, 263, 265, 268, 270 TFEU.

[384] According to Holmes, law consists of "*prophecies of what the courts will do in fact*." Holmes (n. 169). Almost all of what is considered to respond to as "law" comes in the way *of predictions* of what a court or other official body would do if presented with some dispute. An individual's conduct is shaped or affected by a rule exactly according to her (or her lawyer's) perception of the chances that she will be sanctioned on the ground that she violated the rule. See also D'Amato (n. 168)). One theoretical objection to viewing law as a prediction of a judge's behaviour has been the idea that such a view would offer no standard for the judge himself. Thus, "*such a definition of law may be considered to be question-begging. This theoretical objection is arguably invalid because it is possible to see the judge's role as a post hoc fulfilment of the best lawyer's prediction of what a judge would decide*". *See id.* at 495-98. See also Dari-Mattiacci and Deffains (n. 168)627-656.

[385] Although cases can be referred again to other Courts, for pure law matters the CJEU remains the Court of last resort under the EU law framework.

[386] Cf. 2.2.3.

[387] Directorate-General (n. 172)8. Taxation Papers are written by the staff of the European Commission's Directorate-General for Taxation and Customs Union, or by experts working in association with them. Taxation Papers are intended to increase awareness of the work being done by the staff and to seek comments and suggestions for further analyses. These papers often represent preliminary work, circulated to encourage discussion and comment – the views expressed are those of the authors and not of the European Commission.

the courts have finally determined an issue, their ruling should not be called into question."[388] After that moment, the tax position becomes certain, and remains so under the principle of res-judicata.

In the State aid law framework, the moment of certainty occurs when the CJEU publishes its judgment.[389] Given that State aid law falls under the jurisdiction of the CJEU, the moment of certainty for State aid matters coincides with the issuance of the CJEU judgment. The certainty provided by the CJEU is the inevitable result of how the legal system is organised. While the GC has the same capability to deliver judgments, its rulings can be subject to review by the CJEU. In the fiscal State aid framework, it is not uncommon that CJEU overrules the GC.[390] Ex-post certainty in this context may be obtained 15 years or more after the application of a tax position. For instance, in the Apple case, the first ruling was signed in 1991, and after 25 years, the CJEU had not delivered its judgement yet. From the ruling issued by the tax administration until the publishment of the CJEU judgment, the following periods can be identified: (i) the period before the first action of the EC, especially in the case of unlawful State aid, (ii) the period for the GC judgment, (iii) and the remaining period for the CJEU judgment. Also under State aid law framework, the moment of certainty is at the CJEU judgment, which cannot be considered a positive result as intended by G20 to foster investments and trades.[391] This unsatisfying moment of certainty is peculiar to the certainty received via judicial protection since the law is only "*certain ex-post*". [392]

The CJEU judgment provides "total" certainty for the case at stake, or to a specific debated issue within the case. This contribution to legal certainty can also have a general effect of reducing uncertainty via the CJEU interpretation and clarification of EU law. Although there is no doctrine of *stare decisis*, and court is, at least in principle, free to depart from interpretations and legal pronouncements made by other courts and by themselves in earlier cases, the courts regularly decide on the basis of established jurisprudence. While there is no legal obligation to follow previous judicial pronouncements, the apparent obedience to precedent is commonly observed.

Specifically, in cases involving the exclusive sovereignty of member states and the exclusive competence of the EU as regards the competition within the internal market, certain judgments have provided certainty by limiting the investigative power of the EC. These certainties are the effect of CJEU judgments whose content goes beyond the single case and they can be applied in other cases. It may be argued that TP and APAs are considered

[388] *Ryabykh v Russia* (App no 52854/98) (2003) EHRR 2003-IX.
[389] The case referred back to the General Court will be not taken into consideration since the relevant moment of certainty is on points of law, and those points General Court shall be bound by the decision of the CJEU. See Artt. 61, 62(b) Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 3) on the Statute of the Court of Justice of the European Union OJ C 202, 7.6.2016, p. 210–229.
[390] See, for instance, Case C-487/06 P., *British Aggregates v. Commission*, EU: T:2006:253; Joined Cases C-106/09 and C-107/09 P, *Commission and Spain v. Government of Gibraltar and United Kingdom*, EU:C:2011:732; Case C-20/15 and C-21/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981.
[391] See 2.2.
[392] K. Gunther, 'A Normative Conception of Coherence for a Discursive Theory of Legal Justification, (1989) 2 Ratio Juris,155, 157. See also J. Habermas, Justification and Application, Polity, Wiley, 1993, 35.

exclusively on factual analysis, therefore a judgment covers exclusively on that specific single case (so-called case-by-case approach).[393] However, the CJEU judgments, also applicable to TP framework, may go beyond the single case. For example, the answer to the current question of whether the arm's length principle is embedded in Art. 107 TFEU, goes beyond the single case. The arm's length test is factual, but the eventual obligation to apply it regardless of member state implementation is a legal question not related to factual appraisals. Providing answer to such general legal questions reduce the level of uncertainty and limits the scope of the EC investigation. Prior to the pending cases, some of these CJEU judgments that have extra-case effect may be summarised.

Mismatches in tax rates are one of those certainties. Member states retain autonomy over their rates.[394] Consequently, EU law does not prohibit cross-border tax advantage (or disadvantage) as long as each member state applies its tax rules without internal and external discrimination.[395] Moreover, the EU law does not assure neutral taxation in case of cross-border transfer of activities.[396] In Gilly, the CJEU held that enforcing tax harmonization "*would [..] encroach on [MS] sovereignty in matters of direct taxation*" since the EU law does not prevent mismatches of tax rates.[397] Although mismatches may cause double taxation, they do not violate EU law.[398] In general, EU law neither protects actors from double taxation, nor does it provide any general criterion for the attribution of competence between the member states in relation to the elimination of double taxation.[399] From the abovementioned certainties, some hints may be extrapolated. Although EU law aims at ensuring that competition is not distorted, not all forms of distortion of competition are addressed, but only the form of distortion covered by the community law.[400] Different member states tax rates both distort cross-border economic activities and result in tax competition; nonetheless, TFEU does not require conformity of member states tax laws. [401] In this view, the EU fiscal State aid control

[393] M. Merola, 'The Rebus of Selectivity in Fiscal Aid: A Nonconformist view on and Beyond Case Law', (2016) Word Competition, Volume 39, Issue 4,553-556.
[394] Case C-403/03, *Schempp v. Finanzamt München* V, ECLI:EU:C:2005:446, para 34.
[395] Case C-336/96, ECLI:EU:C:1998:221, para 1.
[396] Case C-365/02, *Lindfors*, ECLI:EU:C:2004:449, para 34
[397] Case C-336/96, *Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, ECLI:EU:C:1998:221, paras 24, 34, 38, 49 and 53. See also C. HJI Panayi, State Aid and Tax: The Third Way? Intertax, Vol. 32, Issue 6/7, 2004, p. 304.
[398] Case C-403/03, *Egon Schempp v Finanzamt München V*., ECLI:EU:C:2005:446, paras 9 and10.
[399] Case C-67/08, *Block v. Finanzamt Kaufbeuren*, 2009 ECLI:EU:C:2009:92, para 30. On 15 September 2022, in case C-705/20, Gibraltar v Commission, the CJEU held that the calculation of the aid to be recovered must also take into account the possible application of general rules for eliminating double taxation that was present at the time the aid was granted: Case C-705/20, Fossil (Gibraltar) v Commissioner of Income Tax, ECLI:EU:C:2022:680, para 61.
[400] The statement is coherent with the principle of conferral, according to which, EU is limited by the competences conferred upon it by the Member States, and the competences not conferred upon the EU in the Treaties remain with the Member States. See Arts. 4, and 5 of TEU. See also F. Vanistendael, 'The European Tax Paradox: How Less Begets More', (1996)50 (11–12) Bull. Int'l Fiscal Documentation 531–534.
[401] Schön (n. 23)41–42. A. Kemmerling, 'Does Europeanization Lead to Policy Convergence? The Role of the Single Market in Shaping National Tax Policies', (2010) 17(7) J. Eur. Pub. Pol'y 1058–1073. R. Mason, 'Identifying Illegal Subsidies', (2020) American University Law Review, 342. See also the study on diverging tax policy choices that may create externalities eliminable through a central coordinated response: W. Bratton and J. McCahery, 'Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation', (2001) 38(3) Common Mkt. L. Rev. 718; L. M. Perdiago Borrego, 'State Aid Law and Taxation', (2016) 7 Bocconi Legal Papers 97.

has generated academic criticism, especially when the EC requires some form of tax harmonisation.[402]

The previous analysis suggests that the CJEU, through its judgments, is the sole EU institution that contributes to the legal certainty. EU law and the CJEU judgments serve as the primary reference to validate whether the effects of law are foreseeable.[403] The CJEU emerges as the exclusive EU institution capable of providing legal certainty, while member states and EC can provide merely legal uncertainty.

2.5.3. The EC Contribution to Legal Certainty

The European Commission (EC) function as the executive body of the European Union responsible for proposing legislation, enforcing EU laws, and directing the Union's administrative processes.[404] While this research does not delve into its legislative proposals, the focus is on its enforcement responsibility, particularly within the State aid law framework..[405] According to Article 108 TFEU, the EC has exclusive competence to decide on the compatibility of State aid granted by member states.[406] The EC is entitled to review existing State aid, make decisions on new aid, and initiate proceedings if member states do not comply with notification requirements or with its decision.[407] Within the State aid investigation on direct taxation, the function of the EC spans between the EU exclusive competence on competition within the internal market and the exclusive competence of member states on direct taxation.[408] The EC is empowered to enforce State aid law, limiting member states sovereignties whenever any form of their tax system is deemed incompatible with the internal

[402] D. Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016), 15(3) Eur. St. Aid L. Q. 436. Luja supports the argument that Member States have a sovereign right no to act. R. Luja, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?', (2016) 25(5–6) EC Tax Rev. 323. See also R. Tavares, B. Bogenschneider and M. Pankiv, 'The Intersection of EU State Aid and US Tax Deferral: A Spectacle of Fireworks, Smoke, and Mirrors', (2016) 19(3) Fla. Tax Rev. 121–188. On the contrary, Traversa and Flamini argued that EU fiscal state aid control and the Code of Conduct are 'complementary tools' to tackle harmful tax competition: E. Traversa and A. Flamini, 'Fighting Harmful Tax Competition through EU State Aid Law: Will the Hardening of Soft Law Suffice?', (2015) 14(3) Eur. St. Aid L. Q. 323–331.

[403] See. 2.4.4.

[404] See from Art. 244 to Art. 250 of the TFEU.

[405] A company that receives government support gains an advantage over its competitors. Therefore, the Treaty generally prohibits State aid unless it is justified by reasons of general economic development. To ensure that this prohibition is respected and exemptions are applied equally across the European Union, the European Commission is in charge of ensuring that State aid complies with EU rules.

[406] Art. 108 of the Treaty on Functioning of the European Union.

[407] Art. 108 TFEU and Council Regulation 2015/1589 of 13 July 2015, Laying Down Detailed Rules for the Application of Article 108 of the TFEU, 2015 O.J. (L 248) 9.

[408] According to Art 3(1)b of the TFEU, the rules of competition, which include State aid rules, are within the exclusive competences of the European Union. The exclusivity of Member State in direct taxation is qualified by the lack of discipline within EU Treaties and it is reinforced by the unanimity required under EU law to enact EU direct tax legislation. See Article 115 TFEU (ex Article 94 TEC) OJ C 202, 7.6.2016, p. 95–95.

market.[409] While it is certain is that the EC is entitled to investigate member states tax measures,[410] what remains uncertain is the precise delineation of the balance between the right of the member states to define their tax policy,[411] and the obligation to remain compliant with State aid rules.[412]

The perpetual status of legal uncertainty inherent in State aid law is a result of its continuous evolution.[413] There is a difference between the current legal scenario where we stand and the "planned" legal scenario whom the EU, and EC are oriented.[414] Those different legal scenarios represent the current and the planned step of the process of tax integration.[415] The EC's ambivalent function that holds both legislative and executive powers (such as the State aid law enforcement) plays a role in tax integration. The EC has an ambivalent function, holding both legislative and executive power, where legislative powers are related to the EC participation in the law-making procedure (*lege ferenda*) and its executive powers are related to its role of enforcing the EU law (*lege lata*).[416] State aids are evolving, or at least EC self-recognised the State aid law concept has been evolving.[417] Member states' policies previously judged

[409] Micheau (n. 67). F. Vanistendael, 'Can Member States Survive EU Taxation? Can the European Union Survive National Taxation?', in P. Baker and C. Bobbet (eds), *Tax Polymath, A life in International Taxation*, (IBFD 2010), 363-380.

[410] Although this concept is not a new one, see the landmark judgment Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, para 122.

[411] See Sjaak J.J.M. Jansen, *Fiscal Sovereignty of the Member States in an Internal Market: Past and Future*, (Kluwer Law International 2011),151-199.

[412] C. Peters, *Tax Policy Convergence and EU fiscal State Aid Control: In Search of Rationality*, (Kluwer Law International, 2019). D. Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union* ((Oxford University Press, 2016); C. Peters, 'Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs', in B. Peeters, H. Gribnau, & J. Badisco (eds), *Building Trust in Taxation* (Intersentia 2017), 205-234; T. Dagan, *International Tax Policy. Between Competition and Cooperation* (Cambridge University Press, 2018). R. Mason and M. S. Knoll, 'What is Tax Discrimination?', (2012)121 YALE L. J. 1014.

[413] C. Quigley, 'Direct Taxation and State Aid: Recent Developments Concerning the Notion of Selectivity', (2012), 40 Intertax 112. See also R. Luja, 'Does the Modernisation of State Aid Control Put Legal Certainty and Simplicity at Risk?', (2012) EUR. St. AID L.Q. 765.

[414] Art. 1(6), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, EU State aid Modernization (SAM), COM (2012) 209 final. Moreover, on 15 January 2019, the EC proposed a gradually move from unanimity voting to the ordinary legislative procedure. European Commission2019 (n. 24).

[415] C. Radaelli and U. Kraemer, 'Governance Areas in EU Direct Tax Policy', (2008) 46(2) J. Common Mkt. Stud. 327–328. P. Genschel and M. Jachtenfuchs, 'How the European Union Constrains the State: Multi-Level Governance of Taxation', (2011) 50(3) Eur. J. Pol. Res., 293–314. A. Fantozzi, 'The Applicability of State Aid Rules to Tax Competition Measures: A Process of 'de facto' Harmonization in the Tax Field?', in W. Schön (ed.), *Tax Competition in Europe* (IBFD Publications BV, 2003), 121–132). F. Nanetti and G. Mameli, 'The Creeping Normative Role of the EC Commission in the Twin-Track Struggle Against State Aids and Harmful Tax Competition', (2002)11(4) EC Tax Rev. 185–191.

[416] G. Monti, 'Independence, Interdependence, and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network, in Independence and Legitimacy in the Institutional System of the European Union' in D. Ritlenged (ed.), *Independence and legitimacy in the institutional system of the European Union*, (Oxford University Press, 2016), 180, 190.Blauberger (n. 28) M. Blauberger, 'State Aid Control from a Political Science Perspective', in E. Szyszczak (ed.) *Research Handbook on European State Aid Law* (Edward Elgar Publishing, 2011), 28, 33. M. Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', (2001) 8(2) J. Eur. Pub. Pol'y 192–207..

[417] M. Smith, 'Autonomy by the Rules: The European Commission and the Development of State Aid Policy', (1998) 54 J. COMM. MKT. STUD. 36,59. T. J. Doleys, 'Fifty Years of Molding Article 87: The European Commission and the Development of EU State Aid Policy (1958-2008)', (2009) Paper prepared for presentation at the 11th Biennial

compliant can become non-compliant since the EC decision-making evolves over time.[418] While the CJEU has never explicitly self-recognised the evolution of the State aid law, an implicit confirmation can be inferred from the evolution of the CJEU doctrine and its method of interpretation. In fact, the CJEU does not use the *travaux preparatoire* to interpret the EU Treaty, [419] as this method would anchor the interpretation to the original will of the MS contracting parties. The CJEU's choice of not going back to the original will of the member state will implies its implicit ability to progress by developing the EU Treaties.[420] Scholars like Biondi and Righini offer an overview of the 60 years of the evolution of State aid law application.[421] Also Traversa and Flamini illustrate the evolution of State aid control instrument in the last 20 years by pointing out that State aid law has several inherent limitations, and its content cannot be indefinitely stretched.[422] Kyriazis confirms the evolution of EC's soft law approach to State aid assessment of tax rulings.[423] He particularly highlights that the 1998 EC notice does not include a detailed analysis of the State aid assessment of tax ruling that would have been relevant to cases at stake. Similar concerns have been raised by Miceli who has spotted the issue of European fiscal State aid with the aim of providing insights the related evolution of legislation and objectives of State aid framework.[424]

In an evolving legal context, a tax position that was previously considered compliant may be reevaluated as non-compliant. This kind of possibility on re-evaluating positions is one of the drivers of the uncertainties where the EC can be a contributor. More specifically, it can be argued that the EC can contribute to uncertainty and, to some extent (if all conditions are fulfilled), can only provide legitimate expectations.

International Conference of the European Union Studies Association, to be held April 23-25, 2009 in Marina Del Ray, California.

[418] EC, Commission Decision of 8 July 2009 on State aid C 4/2007 (ex N 465/2006) on the Groepsrentebox scheme which the Netherlands is planning to implement, OJ L 288, 04.11.2009 (hereinafter 'Groepsrentebox Decision'). See also, R. Finley, 'Commission's State Aid Powers Are Too Broad, German Report Says', (2017) TAX NOTES INT'L 446-447. For a general overview of the re-shaping policy, see D. Curtin, *Executive Power of the European Union* (Oxford University Press, 2009).

[419] R.M. Chevallier, 'Methods and Reasoning of the European Court of Justice', (1964-5) 2 Common Mkt. L. Rev. 21, 21–35; P. Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice', in Miscellanea W. J. Ganshof van der Meersch (Bruylant,1972), 325–63; H. Kutscher, 'Alcune tesi sui metodi d'interpretazione del diritto comunitario dal punto di vista d'un giudice', (1976) Rivista di diritto europeo 283–314; K.Lenaertz andJ. A. Gutiérrez-Fons,'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', (2013-4) 20 Colum. J. Eur. L. 3; G. Itzovich, *The Interpretation of Community Law by the European Court of Justice*, (Cambridge University Press, 2019).

[420] S. I. Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the CJEU's Approach to Fundamental Rights, (2012) Common Market Law Review 49: 1565-1612. G. De Burca, 'The European Court of Justice and the Evolution of EU Law: In The State of the European Union', in T. Börzel and A. Cichowskiö (eds)*Law, Politics, and Society*. vol.6, (Oxford University Press, 2003),48.

[421] A. Biondi and E. Righini, An Evolutionary Theory of State Aid Control' in A. Arnull and D. Chalmers, *The Oxford Handbook of European Law*, (OUP, 2015), Ch. 12.

[422] Traversa and Flamini (n. 388).

[423] Kyriazis (n. 388).

[424] R. Miceli, The Role of State Aid in the European Fiscal Integration, Springer International, G. Giappichelli Editore, 2022.

The EC can provide legitimate expectations through its decisions.[425] The conditions that have to be fulfilled to be protected by the legitimate expectation principle can be more easily obtained by taxpayers directly affected by the EC decision. Since the EC decisions are not binding for the CJEU, they cannot provide objective legal certainty. The EC decisions' ability to provide legal certainty is limited to their ability to trigger the protection of legitimate expectations. This ability is related to some requirements: they are directly enacted by the EC and provide precise assurances.[426] The EC decision's ability to provide certainty is bound by the taxpayer's expectation rather than a contribution to State aid's content.

For other similar cases, namely for other taxpayers not directly concerned by the decision, it is not precisely clear whether the EC acts can provide legitimate expectations.[427] In any case, it is more difficult to fulfil the "*precise assurance*" requirement. Actually, there are some cases where the EC has refrained from ordering the recovery of a new aid found incompatible with the common market. The EC has acknowledged the presence of legitimate expectation by referring to an EC decision issued in 1984 in which it was found that an equivalent Belgian provision did not contain any State aid elements.[428] The EC in the "*coordination centres cases*" recognized its "*previous decision practice*" can even mislead other applicants, who can claim legitimate expectation on similar grounds. The EC has also accepted that new types of State behaviour, not self-evident, may deserve the legitimate expectation principle's protection.[429] In the case of *Koninklijke Friesland Foods*,[430] the CJEU annulled the EC decision, since it did not permit new companies to benefit from the incompatible aid scheme which was about to be repealed although other companies have already taken benefit. With this decision, the CJEU held that the EC had "*raised an expectation*" that the relevant scheme was not a prohibited aid.

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[425] According to Article 288 TFEU, a decision is a legal act which is binding upon those individuals to which it is addressed. A Decision forms part of the Eu's secondary law. Under Art. 108 (2) TFEU, when the State concerned does not comply with the EC decision, the Commission or any other interested State may refer the matter to the Court of Justice of the European Union direct.

[426] Case C-265/85, *Van den Bergh en Jurgens and Van Dijk Food Products Lopik v Commission*, [1987] ECR 1155, para 44.

[427] It is noticeable that in such circumstances the EC has adopted a "more protective" approach compared with the CJEU's approach. The EC has refrained from ordering the recovery of a new aid which was found to be incompatible with the common market because See Commission Decision of 21 November 2001, Tax-free provisions introduced by France for setting up establishments abroad, OJ 2002 L 126/27, point 33; Commission Decision of 17 July 1996, Acciaierie di Bolzano, OJ 1996 L 274/30; Commission Decision of 3 June 2003, Orkney Islands Council track-record scheme, OJ2003 L211/49, point 71 and Commission Decision of 3June 2003, Loans for the purchase of fishing quotas in the Shetland Islands, OJ2003 L211/63, point 68. See also K. Jaros and N. Ritter, 'Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid, (2004), Eur. St. Aid. L.Q. 573.

[428] Commission Decision of 16 October 2002, Finance companies (Luxemburg), OJ2003 L153/40 and of 16 October 2002, Coordination centres (Luxemburg), OJ 2003 L 170/20. Commission Decision of 11 December 2002, Central corporate treasuries (France), OJ 2003 L330/23. Commission Decision of 17 February 2003, International financing activities (Netherlands), OJ 2003 L 180/52. Commission Decision of 17 February 2003, Foreign income (Ireland), OJ 2003 L 204/51. Commission Decision of 24 June 2003, Tax ruling system for United States foreign sales corporations (Belgium), OJ 2004 L23/14. Se also the related previous case in 1984: XlV Report on Competition Policy (1984), page 271. Written question no. 1735/90, OJ1991 C 63/37.

[429] As we have seen in the legal certainty section, this concept is related more to the foreseeability requirement of the legal certainty principle rather that the legitimate expectation. See Commission Decision 2006/621/EC on the State Aid implemented by France for France Télécom, O.J. 2006, L 257/11–67. See also Giraud (n. 314).

[430] Case T 348/03 *Koninklijke Friesland Foods v Commission* ECLI:EU:T:2007:256.

The CJEU held that the opening of the investigation was not sufficient to deprive the legitimate expectation of its legal effectiveness. By referring to this case, Rossi Meccanico highlighted the uncertainties of the concrete application of the legitimate expectations, especially in circumstances that require an analysis of the degree of similarities.[431] The doubts concerning the previous EC decision practice's ability to trigger the protection of legitimate expectations can be solved by seeing the same issue from the ability to provide certainty. Only the CJEU is entitled to improve certainty by interpreting the Treaty. Other similar cases can rely exclusively on the Treaty's content and the CJEU case law's subsequent development. The EC decisions practices do not bind the CJEU. The *Groepsrentebox* decision is the case cited in the current investigations that can be used as an example.[432] In the *Apple* case, *Groepsrentebox* was cited to support inconsistency in the EC decision since in that case, the group companies and stand-alone companies are not part of the same reference system. The EC argued that the *Groepsrentebox* situation was different and could not be taken as a reference. What is relevant in terms of certainty is that, even though the case had been identical, the EC decisions could not provide certainty, except for the direct interest parties, since the eventual protection of the legitimate expectation principle requires precise assurance.[433] In the *Amazon* decision, the EC stated that "*even if a contrary decision practice were shown to exist, that could not affect the finding of the present decision*".[434] In the Fiat case, the GC confirmed that: "*the Commission is not bound by its previous practice in taking decisions*".[435] If positive decisions do not provide precise assurance and do not contribute to certainty, negative decisions do not contribute to certainty either. Moreover, if taxpayers cannot rely on previous EC decision practice, the EC cannot rely on it either. In the *Amazon* decision, the EC cited its previous decision-making practice (related to the coordination centre cases) to support the fact that the EC was not adopting a novel approach and it has already applied the arm's length standard under the State aid law analysis.[436] Therefore, positive and negative decisions are irrelevant to test future tax positions. The irrelevance of the previous EC decision-making practice concerns all stakeholders, EC included. In the *Torre Annunziata* case, the CJEU sealed the irrelevance of the EC previous decision practice by confirming that previous EC decisions cannot affect the validity of the current decision, which can be assessed only in the light of the objective rules of the Treaty.

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[431] P. Rossi Meccanico, 'The Koninklijke Friesland Foods Case Law: More Legal Certainty in Legitimate Expectation', (2008) EStAl 1/2008, 112.

[432] EC Decision of 8 July 2009 on State aid C 4/2007 (ex N 465/2006) on the Groepsrentebox scheme, OJ L 288, 04.11.2009; EC Decision Apple, para 234.

[433] Case C-265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik) v Commission* EU:C:1987:121, para 44, and Case C-537/08 P *Kahla Thüringen Porzellan v Commission* EU:C:2010:769, para 63.

[433] EC Decision *Amazon*, para 636.

[434] Ibid, para 597.

[435] Case T-755/15, *Luxembourg v Commission*, para 324.

[436] EC Decision *Amazon*, para 629. See for example, EC Decision 2003/81/EC on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya, C 48/2001 (ex NN 43/2000), para. 26 (2002); EC Decision on the aid scheme implemented by Germany for control and coordination centres, OJ L 177, para. 17 (2002); EC Decision on the State aid scheme C 49/2001 (ex NN 46/2000) – Coordination Centres – implemented by Luxembourg, C 49/2001 (ex NN 46/2000), para. 53 (2002); and EC Decision on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, para. 25 (2003).

To sum up, the EC past decision practice does not bind the CJEU; the member states not covered by the EC decision are not bound either, and EC itself is not bound. Hence, the EC decisions do not provide certainty except for the concerned taxpayer. This decision's ability to provide certainty derives exclusively from its ability to trigger the protection of the legitimate expectation.

The EC can contribute to legitimate expectations also through soft laws instruments.[437] Soft laws are not legally binding instruments;[438] however, they may produce practical and legal effect.[439] The impact of the EC soft law on CJEU decisions is limited to the CJEU's examination and rarely has been considered.[440] Even in the few case law where the CJEU has cited the EC soft law, it appears that the content of the final judgements has been decided by taking into consideration EU law directly, and the EC soft law have not influenced the CJEU.[441]

The EC's soft law can be divided into two main categories diversified by their different functions: the interpretative and the decision-making regulation function. Both soft law categories are a valuable collection and systematisation of the CJEU judgments.[442] They are intended to elucidate the existing body of rules. This function of systematisation and collection serves to clarify EU law, since it improves the taxpayer's ability to understand where the State aid law stands. Their ability to provide certainty is limited to the systematisation and collection of laws and CJEU judgments. As Gribnau pointed out, more problematic are those soft laws whose function is not limited to interpreting and applying hard law, but go beyond mere interpretation.[443] The author considers discretionary power as a precondition for going beyond

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[437] EC Notice and Guidelines constitute documents that are not official legal acts under TFEU (so called Unofficial Soft law instruments different from Recommendations and Opinions recognised by the Art. 288 TFEU).

[438] Case C-360/09 *Pfleiderer* [2011] ECR I-5161, para 21; Case C-303/90, *France v. Commission,* [1991] ECR I-5315, para. 30. The extent to which soft law issued by the EC is "hardened" in court procedure is out of the scope of this analysis: See O. Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of the European Union* (Kluwer, 2013), 242. A. Kovacs, T. Toth andA. Forgacs, 'Effects of European Soft Law at National Administrative Courts', (2016) 14 Loy. U. Chi. Int'l L. Rev. 1. See Case C-322/88, *Grimaldi v Fonds des maladies professionnelles*, 1989 E.C.R. 440; Case C-410/09, *Polska Telefonia Cyfrowa*, ECLI:EU:C:2011:294.

[439] F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' in T Daintith (ed) *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (John Wiley & Sons, 1995).

[440] F. Roccatagliata, 'The European Commission's Soft-Law Approach and Its Possible Impact on EC Tax Interpretation', in (P. Pistone (ed.) *Legal Remedies in European Tax Law*, (IBFD, 2009), 77-79.

[441] Case C-446/03, *Marks & Spencer plc. v David Halsey, Her Majesty's Inspector of Taxes*, ECR-I-10837, 2005.; Case C-08/01, *Assurandor-Societet et v. Skatteministeriet*, 2003; Case C-411/03, *Sevic System AG,* 2005 ECLI:EU:C:2005:762; Case C-74/06, *Commission v. Hellenic Republic*, ECLI:EU:C:2007:534 para 22, 2007; Case C-178/05, *Commission v. Hellenic Republic*, ECLI:EU:C:2007:317 2007, para 62; Case C-210/04, *Ministero dell'Economia e delle Finanze- Agenzia delle Entrate v. FCE Bank plc*, ECLI:EU:C:2006:196 2006; Case C-138/07, *Belgische Staat v. Cobelfret NV*. ECLI:EU:C:2009:82.

[442] EU soft laws are cathegorised in (i) preparatory and informative instruments, (ii) interpretative and decisional instrument such as EC notice and guidelines, (iii) Steering instruments. See H. Gribnau, 'Soft Law and Taxation: EU and International Aspects', (2008) 2 Legisprudence 67.

[443] H. Gribnau, 'Improving the Legitimacy of Soft Law in EU Tax Law', (2007) Intertax, Volume 35, Issue 1, 254. As regard the Notice capability to enhance legal certainty of EC decision-making', see F. Rawlinson, 'The Role of Policy Frameworks, Codes and Guidelines in the Control of State Aid', in I. Harden (ed) *State Aid: Community Law and Policy* (Bundesanzeiger, 1993), 56-58.

the mere interpretation. In this departure, the certainty provided ends and this is where the uncertainty begins. The EC discretion is a consequence of those provisions with an open and indeterminate character. In this framework, the EC presents its own views. Snyder expressed the EC presentation as "*regulation by publication*"[444] and Hoffman as "*regulation by information*".[445] Individuals and tax administrations have been connected not through binding decisions, since they are inherently individual, but through a transfer of information.[446] To the extent that soft law is compliant with both hard law and the CJEU jurisprudence, soft law enhances international tax coordination within the EU.[447] In the *Deufil State aid* case, the CJEU held that the State aid code could not derogate from Arts. 107, and 108 TFEU.[448] In the Preamble of its Notice, the EC self-knowledges that it is limited in its interpretation by the case-law of the CJEU. From the certainty perspective, when the EC soft law diverges from the previous CJEU judgments, this contributes more to uncertainty rather than certainty.[449] The CJEU held that soft-low provisions of the EC should expressly indicate therein the provision of EU law from which it derives its binding force, if not the EC breach the legal certainty principle.[450] Luja manifests a concern similar to the CJEU: "*the Commission should refrain from including in the clarifying notice some legal position not (yet) established by the Courts, or even in contradiction with previous case law […]*".[451] Regarding the current State aid cases on tax rulings, the selective advantage is a crucial point, and the EC Notice clarifies the selective advantage mostly by self-referring to its decisions rather than CJEU judgements.[452] Moreover, since the EC shall not adopt guidelines vitiated by an error of law or a manifest error of assessment,[453] the decisions that have not already passed the CJEU evaluation cannot be used as a reference. In the EC Notice, especially within the relevant sections for the current investigation on tax rulings, Kyriazis noticed that the EC self-referred "*for presenting what it considers to be the law*".[454]The EC cited its hard law decisions in the Notice by evolving the content from early 2014 until the last version. Although Kyriazis highlights that the EC's argument's novelty does not necessarily make it unreasonable or objectionable, the novelty itself is relevant from the legal certainty perspective.

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[444] F. Snyder, 'Soft Law and Institutional Practice in the European Community', in S. Martin (ed) *The Construction of Europe: Essays in Honour of Emile Noël*, (Kluwer, 1994).

[445] H. Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: The Example of EC Competition Policy', (2006) Common Market Law Review 43,169-170.

[446] A. Benz, Two Types of Multi-Level Governance: Intergovernmental Relations in German and EU Regional Policy, (2000) 10 Regional and Federal Studies, 33.

[447] P. Pistone, 'Soft Tax Law: Steering Legal Pluralism Towards International Tax Coordination', in D. Weber (ed.), *Traditional and Alternative Routes to European Tax Integration*, (IBFD 2010).

[448] Case C-310/85 *Deufil v Commission* [1987] ECR 901, para 22. See also Case C-325/91 *France v Commission* [1993] ECR I-3283, para 31.

[449] Cini (n. 401). Rawlinson (n. 427)57; G. della Canenea, 'Administration by Guidelines: The Policy Guidelines of the Commission in the Field of State Aids', in I. Harden, (ed.) *State Aid: Law and Policy*, (HARDEN,1993). Stefan (n. 422).

[450] Case C-325/91, *France v Commission*, ECR I-3283, para 31. Case C-464/09 P, *Holland Malt v Commission*, EU:C:2010:733, para 46; Case C-667/13, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, EU:C:2015:151, para 69.

[451] Luja (n. 398).

[452] EC Notice, paras 169-174. The only cited CJEU case law is the joined cases Forum 187 (n. 54) para 171. This reference will be analysed in detail in the Chapter dedicated to the legal certainty principle.

[453] Case C-431/14 P, *Greece v Commission*, ECLI:EU:C:2016:145 para 71.

[454] Kyriazis (n. 388).

As we have seen previously, the EC decisions are legal instruments not able to provide certainty beyond the single case. The EC itself (and the CJEU) clarified that its previous decision practice does not bind the EC. Despite the good intentions of the guidelines, when the EC make self-reference to its decisions does not contribute to the certainty of content. The possibility that EC develops its vision of "good" State aid policy is discussed in the literature.[455] A departure from the CJEU law by using self-references is one of the enablers of that possibility.

Besides the systematisation and collection of the CJEU judgments, the EC soft laws provide legitimate expectations by limiting the EC discretion.[456] Since in the application of Article 107 (3), the EC enjoys wide discretion[457] and the latter is a source of uncertainty because it increases the variance of possible interpretations of the State aid law. In limiting its discretion, the EC guidelines constitute one element of the regular and periodic cooperation that must be kept between EC and member states.[458] The EC decided that rules to discipline itself were fundamental to improve clarity and consistency.[459] The CJEU recognised the legally binding force of EC soft law through the general principles of law, such as legal certainty.[460]The CJEU admitted the legally binding effect, because by publishing soft law instruments, the EC created a legitimate expectation that it will apply them in its investigations.[461] Whether or not a soft-law instrument can trigger the protection of the legitimate expectation principle depends upon its nature and wording.[462] The legal distinction between substantive and procedural law is fundamental. The EC issues soft law to explain how it will exercise its discretion. However, the notion of State aid is an objective concept defined by the Treaty and detailed by the interpretations of the CJEU. The EC's discretion is limited to particular complex economic assessments.[463]The EC does not enjoy discretion in determining the content of State aid.

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[455] Blauberger (n. 20)

[456] Case C-226/11, *Expedia*, ECLI:EU:C:2012:795, para 29. Case C-464/09 P, *Holland Malt* v *Commission*, EU:C:2010:733, para 46, and Case C-667/13, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, EU:C:2015:151, para 69. See also H. Hofmann, 'Administrative Governance in State Aid Policy' in H. Hofmann and A. Tiurk (eds), *EU Administrative Governance* (Edward Elgar, 2006), 196-199.

[457] C-75/05 P and C-80/05 P, *Germany and Others v Kronofrance*, EU:C:2008:482, para.59; C-667/13, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, EU:C:2015:151, para 67. See also Nanetti and Mameli (n. 400)188.

[458] See Case C-121/10 *Commission v Council* ECLI: EU: C: 2013:784, para 52; Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paras 36 and 37, and Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, para 64. To the extent that those proposals for appropriate measures are accepted by a Member State, they are binding upon that State (see, to that effect, *IJssel-Vliet*, para 42 and 43, and Case C-288/96 *Germany* v *Commission*, para 65), which, as Article 19(1) of Regulation No 659/1999, states must implement them.

[459] G. Cananea, Administration by Guidelines: The Policy Guidelines of the Commission in the Field of State Aids', in I. Harden (ed.), *State Aid: Community Law and Policy*, (Bundesanzeiger, 1993). Rawlinson (n. 427).

[460] O. Stefan, 'Hybridity before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law', (2012) 37 European Law Review 49, 62-64.

[461] Joined Cases C-189, 202, 205, 208 and 213/02 *Dansk Rorindustri and others v Commission* [2005] ECR 1-5425, para 211; Case T-15/02 *BASF v Commission* [2006] ECR 11-497, para 541; Case T-27/02 *Kronofrancev Commission* [2004] ECR 11-4177, para 109. See also M. Eliantonio andO. Stefan, 'Soft Law Before the European Courts: Discovering a "Common Pattern?', Yearbook of European Law, Volume 37, (Oxford University Press, 2018), 457-469. Gribnau (n. 426).

[462] See L. Senden, *Soft Law in European Community Law*, (Hart Publishing, 2004), 440-442; Schonberg (n. 297)121; Raitio (n. 178).

[463] EC Notice on the notion of aid, para. 4.

Therefore, all self-references cited in the Notice do not contribute to certainty. Biondi and Stefan highlighted that the balance between discretion and legal certainty is a characteristic of State aid policy. In their idea, EC soft law instruments serve as a supplement to hard law, and this mix is conceived to balance the discretion and the legal certainty. The EC itself considers that "*legislation is often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework*".[464] Particularly in the tax law framework, the EC considered that, given the difficulty of reaching unanimous agreement on legislative proposals, the soft laws are a basis for its initiative.[465] In our opinion, there is no certainty in the content of soft law instruments. The ability to provide certainty in the content is an exclusive competence of the CJEU. The certainty provided by the EC soft laws is limited in their ability to trigger the principle of legitimate expectation, which does not entail contents but procedural protection.

In conclusion, although the incredible effort that the EC is putting into improving the clarity and predictability of State aid law, the EC's general contribution to EU law clarity is limited to the systematisation and collection of CJEU judgments. The EC hard law and soft law can contribute to certainty to the extent they are able to trigger the protection of the principle of legitimate expectation. In terms of content, a departure from the previous CJEU case-law may contribute more to uncertainty rather than certainty.

2.5.4. Partial Conclusion

The CJEU is the court of the last instance of the European Union. If a moment of certainty can be defined, it occurs when the CJEU publishes its judgment. However, this legal certainty is valid only for the involved taxpayer. The CJEU judgments may have an effect beyond the single case since they clarify and interpret EU law, which is an exclusive competence of the CJEU. On the contrary, the EC can enact decisions or soft law instruments, which do not bind the CJEU, but can provide (under certain conditions) legitimate expectations. In this regard, only the CJEU can contribute to legal certainty, and the EC as well as the member states can contribute only to legal uncertainty, and the EC to legitimate expectations.

[464] White Paper on European Governance, COM (2001) 428, 4 and 20-22.
[465] Communication from the Commission to the Council, the EP and the ESC, Tax Policy in the European Union – Priorities for the years ahead, COM (2001) 260 final, pp. 10 and 22-24. See also Senden (n. 446).

2.6. Chapter Conclusion

Under EU law, legal certainty is a general principle founded on the requirement of predictability. Predictability (or foreseeability) refers to the correct management of legal effects and it is the basic requirement to build necessary confidence in the legal system. Based on this requirement, the legal certainty principle is an umbrella principle with several sub-principles, such as the principle of non-retroactivity, the protection of legitimate expectations, the protection of vested rights, the issues of procedural time limits and the immediate application of the law, as well as the use of comprehensible language in the administration of the EU. Its large scope of application serves the purpose of protecting taxpayers through different legal solutions that can be pursued not only on an *ex-ante* basis, via dispute avoidance mechanisms, but also on an *ex-post* basis.

On an *ex-ante* basis, via dispute avoidance mechanisms, the legal certainty principle represents a valid solution to foster investment and trade and to protect taxpayers' rights. In this regard, it reconciles the OECD/IMF economic-political priority to foster investment and trade by improving tax certainty with the purely legal priority to protect of taxpayer's freedom. The *ex-ante* certainty provided by the dispute avoidance mechanisms (such as tax rulings) was the solution proposed by OECD/IMF, particularly for TP transactions that have been considered the most problematic source of uncertainty.

On an *ex-post* basis, legal certainty acts as a guiding principle when judges are required to evaluate (*ex-post*) whether the level of legal uncertainties goes beyond the acceptable level to the extent that taxpayers cannot foresee the legal consequences of their actions. In this case, the legal certainty protection is less effective for economic purposes, since the judgments can be published even after 10 years after a taxpayer decides to invest. However, the legal certainty principle conserves its purely legal value of taxpayers' protection from unforeseeable legal effects. In the latter case, the principle, as an umbrella principle, has been divided in other several sub-principles, including the legitimate expectations principle. The former cannot be reduced to the latter, since they have different content and different conditions that have to be satisfied in order to claim the eventual protection. In this regard, only the CJEU can contribute to legal certainty. Member states and the EC can only contribute to legal uncertainty and the EC can provide legitimate expectations.

In this thesis, this Chapter represents a foundation for the third and fourth Chapter. Under State aid law, the EC has recently investigated TP transactions covered by dispute avoidance mechanisms. The investigation has deprived taxpayers of both *ex-ante* and *ex-post* protection provided by the legal certainty principle. The *ex-ante* protection cannot be pursued since the domestic dispute avoidance mechanisms do not fulfil the condition to generate legitimate expectations, therefore a new legal instrument will be proposed in the third Chapter. However, the *ex-post* protection provided by the legal certainty principle has already been widely applied,

but the GC and the EC have reduced the legal certainty protection to the legitimate expectations. In this case, there is no need to propose other forms of protection. In this regard, we argue that the legal certainty principle is already a legal solution that offers protection, but it needs to be applied with a less stringent interpretation.

3. Fiscal State Aid: The Lack of Legal Certainty Protection of Dispute Avoidance Mechanisms

3.1. Introduction

In this Chapter, the focus is on the examination of the application of the legal certainty principle under EU law within the context of State aid investigations on tax rulings (dispute avoidance mechanisms). The Chapter aims to determine whether the ex-post protection of the legal certainty principle is narrowly interpreted in these investigations. The Chapter initiates with an introduction to the general legal framework of State aid law, with a specific emphasis on fiscal State aids. Following this, an in-depth review of the ongoing State aid investigations on dispute avoidance mechanisms, particularly APAs for TP transactions, is conducted. Finally, the Chapter evaluates the comprehensive application of the legal certainty principle in these cases. The overarching conclusion drawn is that while certain forms of dispute avoidance mechanisms do not offer *ex-ante* legal certainty, the *ex-post* protection of legal certainty is still available in theory, but has not been fully granted by the GC and the EC. This results in taxpayers being deprived of both *ex-ante* and *ex-post* legal certainty protections.

3.2. EU Fiscal State Aid

3.2.1. Introduction

In this section, the foundational elements of State aid law will be outlined to provide a comprehensive understanding of the framework in which this thesis operates. The primary objective of this section is to define the key concepts and criteria for State aid and offer an overview of the procedural regulations, with a specific focus also on fiscal State aid and tax rulings. By establishing the fundamental elements of State aid law, this section sets the foundation for the following parts of the thesis, which will delve into the limited protection of legal certainty in the recovery of State aid. This section will be organized into four parts: 1) the scope of State aid law, 2) the criteria for a measure to qualify as State aid, 3) the procedural law and regulations, and 4) the recovery of State aid and the protection of taxpayers. The

conclusion will emphasize the importance of understanding both the substance and procedural aspects of State aid law.

3.2.2. State Aid Legal Framework

State aid rules form a subset of EU competition law, with their main provisions outlined in two articles of the EU primary law: Arts. 107 and 108 TFEU. These rules prevent member states from providing aids that distort or may distort competition by favoring selected undertakings.[466] Unlike the other competition rules, State aid law is directly addressed to member states rather than beneficiary undertakings.[467] When the EC qualifies State aid measures as incompatible and orders the recovery, member states must recover. Although the order is addressed to the member state, the beneficiary undertakings have the ultimate burden of recovery.[468] The State aid prohibition within the internal market is not absolute. Art 107(2) and (3) TFEU contain some exemptions that qualify certain aids as compatible with the internal market. Art. 107 TFEU contains substantive provisions, while Art. 108 TFEU contains the main procedural provisions.[469]

At the secondary law level, the Council adopted Regulation No.2015/1589, which establishes detailed rules to implement the application of Art.108 TFEU.[470] This Regulation formalises State aid procedure, and Art.16 of the Regulation is relevant to this thesis as it affirms that

[466] EU Treaties do not define "undertaking". According to the CJEU case-law, the term "*undertaking*" includes every entity (in any legal form and way in which they are financed) that carry out economic activity irrespective of the formal national qualification. See Case C-41/90, *Höfner and Elser v. Macroton*, 1991, ECR I-1979, para 21; Case C-35/95, *Commission v. Italy*, 1998, ECR I-3851, para 36. EU State aid law cover also public authorities and bodies governed by public law as long as they offer goods and services on the market. See Case C-280/00, *Altmark*, 24 July 2003, para 71; Case C-336/00, *Huber*, 19 September 2002, paras 61-64 (case citations are missing)

[467] See L. Hancher, 'The Administrative Procedure – The Privilege Dialogue', in H. C.H. Hofmann and C. Micheau, *State Aid Law of the European Union*, (OUP, 2016), 342. See also different perspectives regarding on the content of the "competition" and how actually it refers mainly to the competition between private undertakings instead of fostering an actual competition that leads to an increase in consumer welfare: e.g. C. Ahlborn and C. Berg, 'Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules' in A. Biondi, P. Eeckhout, and J. Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press, 2004),48; Forrester (n. 33).

[468] Case C-303/88, *Italy v Commission*, [1991] ECR I-1433, paragraph 57; Case C-277/00, *Germany v Commission* ('SMI'), [2004] ECR I-3925, para 75; Case 249/85, *Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung*, [1987] ECR 02345; J. Gyarfas, 'Recovery of State Aid in Corporate Groups and Post-Transfer', (2012) Eur. St. Aid L.Q., 236; P. Ghazarian, 'Recovery of State Aid', (2016) Eur. St. Aid L.Q. 228; C. Arhold, 'Recovery of Unlawful State Aid by the Member States - The New German Approach', (2006) Eur. St. Aid L.Q. 9; A. Birnstiel, 'Recovery of Unlawful State Aid:The Role of Member State Courts in State Aid Recovery Scenarios', (2012) Eur. St. Aid L.Q. 645; L. Hancher, 'State Aid Recovery - A New Public Order', (2013) Eur. St. Aid L.Q. 1; A. Maitrot de la Motte, 'The Recovery of the Illegal Fiscal State Aids: Tax Less to Tax More', (2017) EC Tax Review 456

[469] M. Scütte, *Procedural Aspects of EU State aid Law and Practice, in Erika Szyszczak, Research Handbook on European State Aid Law,* (Edward Elgar 2011), 336.

[470] 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 (Text with EEA relevance), OJ L 248, 24.9.2015, p. 9–29.

the EC shall not require State aid recovery, if this is contrary to a general principle of EU law, such as the legal certainty principle.[471] Another important regulation is Regulation No. 651/2014, known as the General Block Exemption Regulation, which details specific categories of aid as compatible with the internal market, and under specific conditions exempts member states from the obligation to notify.[472]

At soft law level, the EC has issued Notices and Communications to clarify some practical and procedural aspects.[473] Soft lows belong to a category of legal instruments assimilated, to some extent, to the opinion, and recommendations mentioned in Article 288 (4) TFEU. According to the Treaty, soft laws are not legally binding but may produce practical and even legal effects.[474] The CJEU held that, by publishing soft law, the EC self-limits its discretion, which entails that the EC cannot depart from those rules since a possible departure violates the general principles of law.[475]

Among various soft laws, the EC Notice on the application of State aid rules holds particular relevance to direct business taxation, and section 5.4.4. is specifically dedicated to TP rulings.[476] Another pertinent legal instrument is the Code of Best Practice for the Conduct of State Aid Control Procedure.[477] The Code is based on the principle of less and better targeted State aid, which is the purpose of the general State Aid Action Plan.[478] As we have seen, Art. 16 of Regulation 2015/1589 provides that, when a negative decision is adopted, the EC "*shall decide that the member state concerned shall take all necessary measures to recover the aid from the beneficiary*",

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[471] See. 3.4.2.

[472] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, OJ L 187, 26.6.2014, p. 1–78.

[473] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC)No 659/1999 [repealed by Regulation No.2015/1589] laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 140, 30.4.2004, p. 1–134; Commission Regulation (EU) No 372/2014 of 9 April 2014 amending Regulation (EC) No 794/2004 as regards the calculation of certain time limits, the handling of complaints, and the identification and protection of confidential information, OJ L 109, 12.4.2014, p. 14–22; Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, OJ C 136, 16.6.2009, p. 3–12; Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4–17; Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (notified under document number C(2002) 458, OJ C 119, 22.5.2002, p. 22–22; Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1–22; Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 9.12.2003, p. 6–9; Commission communication concerning the obsolescence of certain State aid policy documents. OJ C 115, 30.4.2004, p. 1–2; A. Miladinovic, 'The State Aid Provisions of the TFEU in Tax Matters', in M. Lang, P. Pistone, J. Schuch and C. Staringer, *Introduction to European Tax Law on Direct Taxation*, (Linde 2018), 305

[474] Snyder (n. 423), 64; Rawlinson (n. 427)58; M. Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', (2001) Journal of European Public Policy 8 192, 200.

[475] Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2005] ECR I-5425, para. 211; Case C-526/14 *Kotnik*, [2016] EU: C: 2016:312, para 40; Case C-431/14 P *Greece v Commission*, EU: C: 2016:145, paras 69 and 70. See also A. Biondi and O.A. Stefan, 'The Notice on the Notion of State Aid: Every Light has its Shadow', in B. Nascimbene and A. Di Pascale (eds), *The Modernisation of State Aid for Economic and Social Development* (Springer,2018)..

[476] Commission Notice (n. 24), paras. 36–38.

[477] Code of Best Practice for the Conduct of State Aid Control Procedures, OJ C 136, 16.6.2009, p. 13–20.

[478] European Commission, 'State Aid Action Plan - Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009' (Consultation document) SEC (2005) 795, COM/2005/0107 final.

unless this would be "*contrary to a general principle of Union law*".[479] The EC recognises this exception in its Recovery Notice, which regulates in detail the procedural aspect of the recovery, and its exceptions.[480]

3.2.3. Fiscal State Aid

This thesis is limited to the analysis of fiscal State aid investigation on tax ruling. To understand the context of these investigations, it is essential to know the hierarchy of state aid norms, their different qualification, and the criteria that have to be tested for qualifying a measure as State aid.

Fiscal State aids are a sub-category of State aid granted through the tax system.[481] The CJEU has established that State aid encompasses not only positive benefits, such as subsidy, but also any intervention that, in various forms, mitigate the charges that are "*normally*" included in the budget of an undertaking.[482] Mitigations of the tax burdens that would normally be recoverable from undertakings are fiscal State aids. Fiscal State aids may be granted in different forms: (i) through tax legislation under the form of tax exemption, tax credits,[483] special deduction;[484](ii) through tax enforcement under the form of deferment and forfeit of tax debt;[485] and (iii) through tax assessment made by tax administration under the form of rulings or APAs.[486] This latter form of fiscal State aid, involving tax rulings and APAs, is relevant to the scope of this thesis.

Fiscal state aids follow the same procedures and rules provided for the "*general*" State aids. The EU Procedural Regulation defines State aid as any measure fulfilling all the criteria laid down in Art 107(1) TFEU.[487] From a purely procedural perspective, state aids are divided into "*existing aid*", and "*new aid*". Art. 1 (b) expressly lists five limited categories of existing aids.[488]

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[479] Council Regulation (EU) 2015/1589 of 13 July 2015.
[480] European Commission, Communication from the Commission — 'Commission Notice on the Recovery of Unlawful and Incompatible State Aid', C/2019/5396, OJ C 247, 23.7.2019, p. 1–23.
[481] P. Nicolaides, 'Fiscal State Aid in the EU: The Limits of Tax Autonomy', (2004) World Competition, 27(3), 645.
[482] Case C-30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1961:2 para. 19. Schön (n. 36).
[483] Cases T-92/00 and T-103/00 *Territorio Historico de Alava, Disputaction Foral de Alava*, 2002. ECLI:EU:T:2002:61.
[484] Case C-66/02 *Italy v Commission*, ECLI:EU:C:2005:768, para 78; Case C-222/04 *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze Spa*, ECLI:EU:C:2006:8, para 132.
[485] Case C-156/98 *Federal Republic of Germany v. Commission*, Case C-66/02 *Italy v Commission*, ECLI:EU:C:2005:768, para 78.
[486] European Commission, Communication from the Commission — 'Commission Notice on the Recovery of Unlawful and Incompatible State Aid', C/2019/5396, OJ C 247, 23.7.2019, p. 1–23.
[487] Art. 1 (a) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules of the application of Article 108 of the Treaty of the Functioning of the European Union, art. 16, (hereinafter called "The Procedural Regulation"). The Procedural Regulation repealed and replaced Council Regulation (EC) No 659/1999 of 22 March 1999, laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83/1), hereinafter referred to as "*Regulation 659/1999*".
[488] The Procedural Regulation lists five categories: (i) Aid that existed in MS prior to the entry in force of the TFEU in that respective state, (ii) Aid that has already been authorized, (iii) Measure falling under the General Block Exemption

On the contrary, new aids are negatively defined, namely all aids that are not classified as existing aid. The tax rulings investigated by the EC are qualified as new aid.

Moreover, State aids can be qualified as "*unlawful*" and "*incompatible*" State aids. Unlawful aid refers to new aid put into effect in violation of Art. 108(3) TFEU, namely when a member state has not complied with the obligation of notification or with the standstill clause.[489] Incompatible aid encompasses every measure that fulfils all the criteria laid down in Art 107(1) TFEU.[490] Furthermore, aids can be qualified as either "*aid scheme*" or "*individual aid*". The definitions are provided in Regulation 2015/1589.[491] An aid scheme is any act based on which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid not linked to a specific project may be awarded to one or several undertakings for an indefinite period and an indefinite amount. Individual aid means aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme. All of these qualifications are relevant from both a substantive and procedural perspective. The TP tax rulings investigated by the EC fall under the categories of new, unlawful, incompatible, individual aids.[492]

Similar to the other forms of State aids, four elements of the concept of State aid are required to qualify a measure as State aid.[493]According to the CJEU, the four criteria for a measure to constitute State aid are: (i) an advantage, (ii) granted by a member state, or through member

Regulation that are deemed to be authorized, (iv) Measure that had been granted prior to the entry of the limitation period of ten years, (v) Measures that were put into effect at a time that those measures did not constitute aid but have subsequently become aid due to the evolution of the internal market or the liberalization of an activity without having been altered.

[489] The Standstill clause is a provision set forth in Art. 108(3) TFEU and Art. 3 of the Procedural Regulation that provides that any new aid must be notified to the EC and cannot put into effect prior to its approval.

[490] See 3.2.3.1-3.2.3.4.

[491] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU [2015] OJ L248.

[492] The only exception is the Belgian Excess Profit case, which is an aid scheme, see GC Cases T-131/16 and T-263/16, *Kingdom of Belgium and Magnetrol International v European Commission*, ECLI:EU: T:2019:91, 2019. See also the proposed differentiation between "ad hoc individual measures" and "individual measures applying a general scheme: Report for the hearing of 5–6 March 2020 in *Amazon*, para. 157. Accordingly, Panci argued that the special feature that makes tax rulings different from ad hoc individual measures is that tax rulings could classify as individual measure applying a general scheme. L. Panci, 'Latest developments on the Interpretation of the concept of selectivity in the field of corporate taxation' (2018) 3 EStAL 353, 364. The GC identifies four conditions that have to be met for an aid to be qualified as an aid scheme: (i) there is a legal act establishing the basis for the granting of aid, or a *de facto* aid scheme; (ii) the elements which constitute the essence of the scheme are clear from the act and need no additional implementing measures; (iii) the national authorities do not have discretion in establishing the elements which form the essence of the scheme; and (iv) undertakings benefiting from the scheme are defined in an abstract and general form. See *Fiat* T-759/15 EU:T:2019:270, para. 342–348.

[493] M. Lang, 'State Aid and Taxation: Recent Trends in the Case Law of the CJEU', (2012) 11 EStAl 2, 411. K. Lanaerts, 'State Aid and Direct Taxation', in H. Kanninen, N. Korjus, and A. Rosas (eds)., *EU Competition Law in Context: Essays in Honour of Virpi Tiili*, (Hart Publishing 2009), 294. P. J. Wattel, 'Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters', (2013) 5 World Tax Journal 1, 129.

state resources, (iii) to certain undertakings or the production of certain goods, namely selectively, (iv) affects intra-Union trades and distorts or threatens to distort competition.[494]

3.2.3.1. The Advantage

The advantage criterion is the first required condition to qualify a measure as State aid. In the context of State aid law, an advantage refers to any economic benefit that private undertakings could not have received under the "*normal market condition*" without the intervention by the member state.[495] As expressly outlined in Art. 107(1) TFEU, an advantage can be granted "*in any form whatsoever*", which means that advantage covers not only positive aids, such as subsidies but also state interventions which, in various forms, mitigate the charges normally included in the budget of an undertaking, such as tax measure.[496] The measure, in whatever form, reduces the overall burden of undertakings by producing the equal effect of a positive subsidy.[497] The effect of the advantage is limited to the difference arisen before and after the state intervention.[498] The possible economic benefit, enjoyed as a result of exploiting the advantage, is not included in the computation of the advantage.[499] Therefore, the recovery of aid entails the restitution of the advantage procured by the aid for the beneficiary, not the restitution of the economic benefit eventually exploited.[500] The advantage criterion is irrespective of form, cause, objective and condition of the state intervention.[501] Cause, objective and conditions

[494]See, e.g., Joined Cases C-20/15 P and C-21/15 P *Commission v. World Duty-Free Group Banco Santander SA, and Santusa Holding SL*, ECLI:EU:C:2016:981, para 53.

[495] Commission Notice (n. 24) para.5. See also P. Rossi-Meccanico, 'The Fiscal Aid Goes Global', (2007) EC Tax Review, 2007/3, 136.

[496] Case C-30/59, *Gezamenlijke Steenkolenmijnen*, ECLI:EU:C:1961:2, para19: '*The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect*'. See also, C-387/92, *Banco Exterior de España* [1994], ECLI:EU:C:1994:100, paragraph 13; C-156/98, *Germany v Commission* [2000] ECLI:EU:C:2000:467, paragraph 25; Commission Notice (n. 24), para 68.

[497] Case C-173/73, *Italy v Commission*, ECR 709 paragraph 13 and Case C-310/85, *Deufil v Commission*, ECLI:EU:C:1987:96, paragraph 8.

[498] Ibid.

[499] Case C-164/15 P - *Commission v Aer Lingus*, ECLI:EU:C:2016:990, para 92. Opinion of AG Mengozzi Joined Cases C-164/15P and C-165/15P, *Aer Lingus, Ryanair v Commission*, ECLI:EU:C:2016:990, para 41. See also para 52 of Joined Cases C-164/15P and C-165/15P, *Aer Lingus, Ryanair v Commission*, ECLI:EU:C:2016:990.

[500] C-164/15P and C-165/15P, ibid paras 100 and 102.

[501] Case C 173/73, *Italy v Commission*, ECLI:EU:C:1974:71, para 13; Joined Cases C-106/09 and C-107/09 P, *Government of Gibraltar*, ECLI:EU:C:2011:215, para 73; Case C-279/08 P *Commission v Netherlands* [2011] ECLI:EU:C:2011:551, para 51. Commission Notice on the notion of State aid as referred to in Article 107(1), adopted 19/05/2016, C (2016)2946, para 67.

may be relevant only under the selectivity criterion.[502] In the light of the irrelevance of form, objective, cause and condition, the advantage criteria shall be analysed concerning its effects.[503]

3.2.3.2. Granted by the State or through State Resources

The second criterion to qualify a measure as State aid is that the deemed State aid must be provided by a member state or through state resources. The concept of "*State resources*" is broad and not limited to subsidies in the strict sense. State aid resources entail a public financial burden that can be an active payment, such as subsidy, or a waiver of debts (such as unpaid tax).[504] Any public resources involving a cost for the member state budget can be considered "*state resources*". Within the tax framework, if a measure results in lower taxation, it is generally considered to be financed through state resources.[505] State resources can be transferred directly or indirectly to the beneficiary.[506] Moreover, the aid must be attributable to the action or decisions of the member state itself. Mere implementations of an EU Directive, without involving the member state's discretion or decision, would not constitute State aid.[507]

3.2.3.3. Selectivity

Selectivity is the third required criterion to qualify a measure as State aid. Selectivity or "*selective advantage*" test evaluates whether a domestic measure is "*favouring certain undertakings*".[508] The CJEU has applied different methodologies to test whether the investigated measure is selective. In earlier jurisprudence, the CJEU distinguished between two approaches: the "*derogation*" and "*comparability*" approaches.[509] The derogation approach boils down to find a

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[502] Case C-143/99 *Adria-Wien Pipeline*, ECLI:EU:C:2001:598, para 41. Case C.487/06 P *British Aggregates*, paras. 84, 85, 87 and92. Case T-210/02 *Renv British Aggregates Association v Commission*, ECLI:EU:T:2012:110, para 68. C. Quigley, 'Comments on State Aid, Taxation and Abuse of Law', in R. De la Feria and S. Vogenauer (eds.), *Prohibition of Abuse of Law*, (Hart Publishing 2011), 509-518. B. Kurcz and D. Vallindas, 'Can General Measure be…Selective? Some Thoughts on the Interpretation of a State Aid Definition', (2008) 45 CML Rev 1, 81. Szudoczky (n. 35)551-553.

[503] C-173/73, *Italy v Commission*, ECLI:EU:C:1974:71, para 13 ; C- 480/98, *Magefesa*, ECLI:EU:C:2000:559, paras 19 and 20 ; C-173/73, *Italy v Commission*, ECLI:EU:C:1974:71, para 13. Case C-241/94 *France v Commission* [1996] ECR I-4551, para 1. Commission Notice (n. 24), para 67.

[504] Ibid, para.70.

[505] B. J. Kiekebeld, *Harmful Tax Competition in the European Union,* (Kluwer,2005), 81.

[506] Aid granted to a private undertaking controlled by the State is and indirect granted measure. See Case C-156/98, *Germany v Commission*, ECLI:EU:C:2000:467, paras 26 and 27; Case C-382/99, *Netherlands v Commission*, ECLI:EU:C:2002:363, paras 60 to 66; T-424/05, *Italy v Commission*, ECLI:EU:T:2009:49, paras 136 to 147.

[507] Case T-351/02, *Deutsche Bahn AG v Commission*, ECLI:EU:T:2006:104 para 102. C-460/07, *Puffer v Unabhängiger Finanzsenat Außenstelle Linz*, ECLI:EU:C:2009:254, para 70.

[508] A. Miladinovic, Selectivity and the Arm's Length Principle in EU State Aid Law, IBFD: Amsterdam, 2022.

[509] [509] Currently there is a debate relating to whether the selectivity criterion should be limited to a discrimination test. See Schön (n. 36)8-14. The CJEU has determined selectivity using a derogation approach, see e.g. Joined Cases C-20/15 P and C-21/15 P, *European Commission v. World Duty Free Group*, ECLI:EU:C:2016:981, paras 54 and 75.

reference rule and an exception, while the comparability approach addresses the issue of finding a difference in treatment of comparable undertakings in a similar legal and factual situation.[510] Most recently, these approaches have been reconciled into a unified test consisting of the following steps: (i) identifying the tax reference system and the comparable undertakings in light of the objective of that reference system, (ii) whether selected comparable undertakings are treated more favorably in derogation from the reference system, (iii) and whether this derogation can be justified by the basic or guiding principles of the tax system.[511]

Rossi Meccanico suggests that both methods are linked with different criteria to establish selectivity.[512] In particular, the derogation test is indispensable for establishing the advantage, and the comparison test for the selectivity since the justification stage (whether the advantage is justified by the objective of the general scheme of the system) is part of the selectivity test.

This sort of collapsed analysis has created doubts about the so-called reference system, which has been - in most cases- the crucial step of the methodology for assessing selectivity.[513] It involves comparing the tax levied on an undertaking in a given situation with the "*normal*" levy of taxes according to a set of norms used as reference. The reference is used as a benchmark to find a possible deviation from the normal application of the tax system, and only "*certain undertakings*" have benefited from it.[514] In certain situations, the reference system is paramount for the selectivity assessment since different outcomes may result depending on which reference system is took as a benchmark.[515] In other situations where the reference system cannot be identified, the selectivity assessment does not require a reference system. Instead of relying on the reference system and the possible exception, the selectivity test is based on the existence of a difference in the treatment between undertakings in a comparable situation.[516] The reconciliation of the two methodologies is based on the conclusion that the reference system can be the first step to correctly identify the objective of the measure in the light of which the comparability analysis will be performed.[517]

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[510] This earlier differentiation made by the CJEU is fully summarised in Szudoczky and Van de Streek, 'Revisiting the Dutch Interest Box under the EU State Aid Rules and the Code of Conduct: When a 'Disparity' is Selective and Harmful', (2010) 38 Intertax, 264.

[511] See, *inter alia*, Case C-374, *A- Brauerei*, EU:C:2018:1024, para 32. See also Schön (n. 36).

[512] P. Rossi-Meccanico, 'The Point on Selectivity in State Aid Review of Business Tax Measures', in P. Pistone (ed.), *Legal Remedies in European Tax Law* (IBFD, 2009), Ch. 14.

[513] The literature is divided about the importance of the reference system. See in favour: V. Hernández Guerrero, 'Defining the Balance between the Free Competition and Tax Sovereignty in EC and WTO Law: The "Due Respect" to the General Tax System', (2004), German Law Journal 87. See a contrary view L. L. Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga', (2016), Journal of European Competition Law & Practice 369, 377. See also Case C-236/16, *Asociacion Nacional de Grandes Empresas de Distribution (ANGED) v. Generalitat de Catalunya*, ECLI:EU:C :852, AG Kokott's Opinion, para 88.

[514] See EC Notice, para 133.

[515] See, *inter alia*, Case C-78/08, *Paint Graphos*, ECLI:EU:C:2011:550.

[516] See, *inter alia*, Joined Cases C-106/09 P and C-107/09 P, *Gibraltar v. Commission*, ECLI:EU:C:2011:732.

[517] Case C-203/16 P, *Dirk Andres*, ECLI:EU:C::2017, 1017, AG Wahl's Opinion, para 99.

Even if a measure is initially deemed as *prima facie* selective, the CJEU jurisprudence has determined a possible "*justification*" of the selective tax advantage.[518] Once the objective of the reference system has been identified, the deviation from that reference is confirmed; the selectivity test only confirms the prima facie of the existence of the State aid.[519] In this case, an investigated member state has the burden of proof to show that the *prima facie* selective tax measure is fully in line with the underlying rationale of the tax system itself. [520] Despite the derogation, a taxpayer can be justified by "*intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system*".[521] Contrary to the *prima facie* selectivity, where the burden of proof is on the EC, in the justification stage the burden of proof is on the member states: "*In particular, it is not shown that the exemption measure at issue would be the direct result of the founding or guiding principles of the Austrian tax system or that it would be indispensable for the purpose of ensuring fairness. In that regard, it has consistently been held that it is for the member state which has introduced a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question*".[522]

Among all fiscal State aid case law, the following several cases provide relevant information to help the reader evaluate the EC's approach. The case law will be presented chronologically, since the time of judgements is relevant to evaluate when possible unforeseeable law effects have been clarified by the CJEU.

In the World Duty Free case, the CJEU answered whether selectivity entails a more favourable treatment of certain categories of undertakings or any deviation from the general tax system in comparable situations meets the selectivity test (unless justified by the general underlying principle of the tax system). [523] The CJEU stated that the selectivity test does not require an identification of the specific group of undertakings that have benefited from the tax advantage but rather on showing that comparable situations are treated more favourably.[524] One of the questions that remain unanswered is what reference system should be used for the comparability analysis: the overall tax system of corporate taxation or some specific rules within that system.[525]

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[518] Case C-452/10 P *BNP Paribas* ECLI:EU:C:2012:366, para 101 et seq. And para 120 et seq.

[519] A. Biondi State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid', (2013) Common Mark Law Rev 50(6),1736; T. Lang 'Autogrill Espana and Banco Santander: The Concept of "General" Tax Measures Clarified for State Aid'. (2015) Eur Law Rev 40(5),765 et seq.; **C.** Quigley, *European State Aid Law and Policy*, (3rd ed. Hart Publishing, 2015), 119-123.

[520]Case C-279/08 P *Commission v. Netherlands*, ECLI:EU:C:2011:551, para 62; European Commission Notice (n. 24) para 128.

[521] European Commission Notice (n. 24), para 135.

[522] Case T-251/11, *Austria v Commission* EU:T:2014:1060, para. 117.

[523] Joined Cases C-20 & 21/15 P, *World Duty Free*, EU:C:2016:981.

[524] Ibid, para 67.

[525] *Ibid*, para 63.

Although it is disputed, the CJEU answered this question in the *Gibraltar* case.[526] This case concerned a Gibraltar's tax reform aimed at introducing a new general tax regime. The investigation aimed to test whether the tax system favoured companies without a physical presence in the country. This case has shown that "*de-facto selectivity*" falls within the scope of State aid control.[527] In a general system of corporate taxation, favouring cross-border over domestic undertakings constitutes a selective advantage. The Court extended the previous line of reasoning where the reference system has been the domestic legal framework.[528] To some extent, the CJEU confirmed that the reference system is not necessarily a general tax system, as this system itself might be selective in its effect. The EC performed an evaluation that compares the existing legal framework against a hypothetical state-aid-compliant rule.[529] In any case, the benefit was granted irrespective of the tax law of any other State. The reference system has been hypothetic, but grounded in the domestic reference system. Consistently, the fact that the advantage was granted by the State or through State resources was not the main argument.[530] In this case, offshore companies were considered to be in a comparable situation with companies that have a real presence in Gibraltar in the light of the objective of the proposed tax reform that was the introduction of a general tax system for all companies registered in Gibraltar. In more general terms, the Gibraltar case has put the basis to support that integrated and not integrated companies fall under the same reference system.[531]

In the *Mole* case, the CJEU clarified that a measure is selective if it differentiates between comparable undertakings in light of the objective of the reference system, unless the conferred aid is individual (as in the case of tax rulings) in which case the selectivity is presumed.[532] In the State aid analysis is relevant whether the specific measure of the case under investigation derogates from the reference framework by providing an advantage. The *Mole* case has introduced certain procedural grounds on which the EC can rely to avoid the proof of selectivity.[533]

The *Forum 187* case is crucial for understanding the evaluation of the current State aid investigations on TP.[534] In this t judgment published in 2006, the CJEU has laid the foundations (it is not undisputed) to create an obligation to apply the arm's length standard as

[526] Joined Cases C-106 & 107/09 P, *Commission and Spain* v. *Government of Gibraltar and United Kingdom*, EU:C:2011:732
[527] Ibid, paras. 101–107.
[528] Mason (n. 387)30–35; Biondi (n. 503)1733–1736. See also F. Engelen and A. Gunn, 'State Aid: Towards a Theoretical Assessment Framework', in A. Rust and C. Micheau (eds), *State Aid and Tax Law* (Kluwer 2013),137 – 141.
[529] M. Lang, The Gibraltar State Aid and Taxation Judgment – A "Methodological Revolution"?', (2012) 11 EStAL 805–807.
[530] R. A. Galendi Jr, 'State Aid and Transfer Pricing: The Inherent flaw under Supranational Reference System', (2018) Intertax, Volume 46, Issue 12, 994-1010.
[531] Joined Cases C-106 & 107/09 P, *Commission and Spain* v. *Government of Gibraltar and United Kingdom*, EU:C:2011:732. See also P. Pistone, 'Smart Tax Competition and the Geographical Boundaries of Taxing Jurisdictions: Countering Selective Advantages Amidst Disparities', (2012) 40(2) Intertax 88, 219-250; Haslehner (n. 107)438.
[532] Case C-15/14 P, *Commission v. MOL*, EU:C:2015:362, para 60. See also, SA.46470, *IKEA*, para 109.
[533] See e.g. *Amazon* Decision, para. 399.
[534] GC Decision in *Apple*, paras. 34-35 and 192 et seq.

an allocation.[535] Forum 187 concerned the TP method applied to determine the profit of certain companies established in Belgium, assuming that such companies belong to a MNE and perform certain activities. The TP rules applied implies that such qualified companies would receive as remuneration for their activities an 8% profit margin on their costs excluding "*staff costs, financial charges and corporate tax*".[536]The CJEU held that "*the transfer price [does] not resemble those which would be charged in condition of free competition*".[537] This case will be analysed in more detail in the section concerning the *ex-post* protection from the recovery.[538]

The FIAT case is the last landmark judgment of the tax-ruling saga.[539] The CJEU concluded that both the GC and the EC had erred in law since the determination of the reference system carried out in the context of the assessment of selectivity must follow from an objective examination of the content, the structure, and the specific effects of the applicable rules under the national law of that State.[540]This statement has close the speculation based on an hypothetical external reference system directly embedded in Art 107 TFEU. In paras 102-104, the Court clarified that the Forum 187 does not suggest that the arm's length principle is applicable irrespective of whether that principle has been incorporated in the domestic law system. However, according to para 122, the EC retains is authority to investigate member state measures when the parameters laid down by national law are manifestly inconsistent with the objective of non-discriminatory taxation of all resident companies.[541]

3.2.3.4. Distortion of Competition and Affecting Trade between Member States

The fourth criterion for qualifying a measure as State aid deals with the distortion to competition and affects intra-Union trade. This criterion expresses the underlying rationale of State aid law, namely, maintaining competition within the internal market.[542] A state interference that improves the beneficiary's competitive position is not allowed.[543] The mere

[535] See contrary, Monsenego (n. 67)31. L. Parada, 'Between Apples and Oranges: The EU General Court's Decision in the "Apple case"', (2021) EC Tax Review Volume 30, Issue 2, 55 – 63; Richard (n. 35). Kyriazis (n. 388), 435; P. Nicolaides, 'State Aid Rules and Tax Rulings', (2016) 15(3) EStAL 416, 425.
[536] Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium and Forum 187 ASBL v Commission*, ECLI:EU:C:2006:416, para.9.
[537]Ibid, para 96.
[538] Cf. 3.4
[539] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, para 122.
[540] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, para 72.
[541] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, para 122.
[542] R. Luja, *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation*, (Intersentia, 2003).
[543] M. Sánchez Rydelski, *The EC State aid Regime: Distortive Effects of State Aid on Competition Trade*, (Cameron May, 2006), 85

fact that the position is strengthened is sufficient to conclude that intra-Union trade is affected.[544] The distortion of competition does not necessarily occur, since it is sufficient that a measure "*threatens to distort competition*".[545] It is unnecessary that the undertaking is involved in intra-EU trade since the effect of the advantage that other undertakings have small chances of penetrating the market of the concerned member state.[546] Both the EC and the CJEU appear to devote little attention to this latter criterion since along with a measure that has been found selective, its effect on competition and intra-group trade is presumed.[547] However, the two criteria shall not be confused. For example, under the TP framework, when the EC validated the cost-plus method of coordination centers, the justification was made under the selectivity assessment rather than the effect on competition.[548] The justification is part of the selectivity analysis, and the competition was not considered as a justifying criterion. In the same vein, the CJEU has held that member states could not justify unilateral measures to compensate for competitive disadvantages. [549]

Understanding the distinction between these criteria is crucial for a clear methodology in line the CJEU jurisprudence. The distinct character of all methods also helps during the assessment of the risk of State aid (this issue is covered in more detail in the last Chapter). For example, the clarification of the difference between distortion on competition and selectivity is essential to understand whether an advantage granted in consequence to an upward TP adjustment may be justified and what are the different level of State aid risks.

3.2.4. State Aid Procedure: Notification and the *ex-post* EC Investigation

There are two different procedures related to State aid. The simplified procedure for existing aid (which is out of the scope of the present thesis), and the procedure used for new aid.[550]

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[544] Case C-730/79, *Philip Morris v. Commission,* ECR-2671, para. 11

[545] Case T-214/95, *Vlaams Gewest v Commission*, para 46.

[546] Case C-102/87, *France v Commission*, ECLI:EU:C:1988:391 para 19, Case C-75/97 *Belgium v Commission*, ECLI:EU:C:1999:311 para 47, Case C-142/87 *Belgium v. Commission (Tubemeuse)* (1990) ECR-959, and Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98.
Alzetta Mauro and others v. Commission of the European CommunitiesECLI:EU:T:2000:151.

[547] J. W. Kuipers and V. Hernandez Gerrero, 'Fiscal State Aid: The European Commission on a Mission', (2008) 34 Int'l Tax J.33.

[548] EC Decisions in C-45/2001 *France - Headquarters and Logistic Centres* (OJ L23/1 Jan. 28, 2004); in C-15/2002 *Belgium - Coordination Centres* (OJ L 282/25 of October 30, 2003); in C-49/2001- *Luxembourg Coordination Centres* (OJ L 170/20 of July 9, 2003) and inC-50/2001 - *Luxembourg Finance Companies* (OJ L 153/40 of June 20, 2003)

[549] Case T-298/97, *Alzetta Mauro and others v Commission*, paras 100 and 101. Case 6/69 and 11/69 *Commission* v *France*, paras 20 and 21. See also Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, para 21.

[550] According to Arts. 107-108 TFEU and Arts. 21-23 of the Procedural Regulation, existing aids are constantly monitored by the EC in cooperation with member states. When the aid is no longer compatible with the internal market, the EC proposed an amendment of the measure. In case the member states do not accept, the EC is entitled to initiate the formal investigation procedure. See Quigley (n. 37)539.

The procedure consists of (i) notification, (ii) preliminary examination, and (iii) formal investigation procedure.

According to Art. 108 (3) and Art. 2 of the Procedural Regulation, if a member state plans to introduce an aid measure, it is required to notify the deemed aid to the EC. The measure cannot be put into effect before the EC authorisation takes a decision on the compatibility of the aid with the internal market (so-called standstill clause).

According to Art. 4 of the Procedural Regulation, after receiving a notification, the EC undertakes a preliminary examination. Upon notification, the EC has to conclude the preliminary examination within two months. The relatively short duration serves as a strong incentive to notify deemed State aid measures, and it is similar to the duration of the preliminary assessment of the MAP applied to TP transactions. [551] The EC faces the same issue of tax authorities when they have to assess the preliminary examination within a MAP procedure. Besides different roles and functions, the situation regards a second assessment made by different authorities. The preliminary examination may result in three different outcomes: (i) the notified measure does not constitute aid; (ii) the aid falls within the scope of Art. 107 (1) and it is considered compatible (decision not to raise objections); (ii) the decision to initiate the formal investigation procedure. The first scenario provides immediate certainty, and the member state is permitted to put the measure into effect. The last scenario implies an additional delay in receiving certainty since the next step to obtain certainty will be the final decision after the formal investigation procedure. Another certainty is that the preliminary examination cannot be concluded with a negative decision.[552] Pursuant to Art. 263 TFEU, the decision closing the preliminary examination constitutes legal acts that can be challenged before the GC only when the decision gives rise to definitive legal effects, which cannot be regularised by the final decision.[553] In the opposite case, only the final decision can be challenged before the GC.

According to Arts. 6-9 of the Procedural Regulation, when the EC has launched the formal investigation procedure, the member state and other interested parties are invited to submit comments within a period of usually one month. To complete the assessment of the notified measure, the EC can request supplementary information from any other member state, association, undertakings.[554] The EC shall complete the formal investigation procedure within 18 months by delivering a final decision. The decision may have four outcomes: (i) the measure does not constitute State aid, (ii) the aid is compatible with the internal market - positive decision-, (iii) the aid can be considered compatible only if supplemental conditions are fulfilled – conditional decision, (iv) the aid is not compatible with the internal market – negative decision – and it cannot be put into effect by the member state, or in the case that it

[551] OECD Model Tax Convention on Income and on Capital (n. 104)45.
[552] Quigley (n. 37)571.
[553] CJEU Case 312/90, *Spain v Commission*, paras 11-26 and CJEU Case C-47/91 Italy v Commission, ECLI:EU:C:1994:358, paras 19-32.
[554] Procedural Regulation (n. 472), para 10.

has had effects already, it shall be recovered. The member states may challenge a EC decision under Article 263 TFEU. In the current State aid investigation on TP rulings, all member states have challenged the EC Final Decision.[555] A person individually and directly concerned may bring an action under Art. 263 TFEU against the EC Decision. In this latter case, only an interest party has the right to challenge the EC Decision. Amazon, Starbucks, Engie, Nike, Huhtamaki, Ikea, FCA, Apple have all been interested parties. From a procedural perspective, the case is against the member state. For example, the US Government, as a third party, formally applied to intervene in support of Apple. However, the CJEU rejected the application since the US Government had not established a direct and existing concern in the outcome of the case that would give rise to the alleged negative effect.[556]

Within the State aid procedure, national courts play a role in applying Art.107 TFEU, in conjunction with Art. 108(3) TFEU. A relevant aspect that has to be considered, especially from the certainty perspective, is that national courts cannot rule on the compatibility of the aid with the common market, since this is part of the exclusive role of the EC.[557]

To conclude, Chapter three of the Procedural Regulation regulates the procedure regarding unlawful State aid, which is the procedure applied by the EC for the TP tax rulings subject of the study of this thesis. In this case, when the EC receives information from any source (interested party, competitors, media, public disclosure) that a member state has put into effect a deemed State aid measure without notification, the EC, *motu proprio*, is entitled to assess the compatibility of that measure.[558] For example, the EC investigation on Ireland rulings and Apple started after the publication of the hearings on tax avoidance in the United States.[559] After the formal investigation procedure, if the EC qualifies that measure as State aid incompatible with the internal market (negative decision with recovery), the member state has to recover the unlawful and incompatible aid to re-establish the situation prior that distortion

[555] The EC itself may bring an action against a Member State under the Art. 108 (2) TFEU. This action is different from the general provision of infringement proceedings enshrined in the Arts. 258-260 TFEU.

[556] The negative effect is represented by the amount of tax credits, or deduction, which the parent company of the subsidiary registered in Ireland may claim from the US revenue authority as a consequence of the repayment ordered by the Commission. See Case C-12/18 P(I), *United States v Apple*, ECLI:EU:C:2018:330, paras 16, 18 and 26. See also Art. 40 of the Statute of the Court of Justice of the European Union.

[557]National courts can rule that a given aid is illegal, but they cannot evaluate the compatibility with the internal market. See Notice on Cooperation between National Courts and the Commission in the State aid field, OJ 1995 C 312/07, and Notice of the Enforcement of State Aid Law by National Courts, OJ 2009 C 85/1. See also C. HJI Panayi, *European Union Corporate Tax Law*, (Cambridge University Press, 2013), 147.

[558] J. Bernstein, Secrecy Worlds: Inside Panama Papers Investigation of Illicit Money Networks and the Global Elite, (Henry Holt and Co., 2017), 200,; see ICIJ, 'Explore the Documents: Luxembourg Leaks Database', https://www.icij.org/investigations/luxembourg-leaks/explore-documents-luxembourgleaks-database.See also O. Marian, 'The State Administration of International Tax Avoidance', (2017)7 HARV. BUS. L. REV. 1, 8. I. Hardeck and P. U. Wittenstein, 'Assessing the Tax Benefits of Hybrid Arrangements, Evidence From the Luxembourg Leaks', (2018) 71 National Tax J. 295, 297-98.

[559] Offshore Profit Shifting and the U.S. Code, Par.2 (Apple, Inc.): Hearing Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, 113th Cong. (2013).

on the competition. In all tax ruling cases, except McDonald's, the EC concluded its investigation with a negative decision with recovery.

3.2.5. Recovery of Unlawful Aid

In principle, all aids that are granted in violation of the Art. 108(3) are required to be recovered.[560] The EU Treaties provisions do not mention recovery as an instrument of EU policy. Neither Articles 107 nor 108 TFEU expressively provide that unlawful aid has to be recovered. Art. 108(2) TFEU "*only*" authorises the EC to review member states' aid measures. The EC's current power to order the recovery has been clarified by the CJEU jurisprudence.[561] In the *Commission v. Germany* case, the CJEU inferred from the abolition options in Art. 108 (2), as referred to in Art. 108(3), that "*to be of practical effect, this abolition or modification of unlawfully granted new aid may include an obligation to require repayment of aid granted in breach of the Treaty, so that in the absence of measures for recovery, the Commission may bring the matter before the Court*".[562] The CJEU has also confirmed the recovery as a remedial consequence flowing from the procedural framework of Art. 108 TFEU.[563] Currently, pursuant to Art. 16 of the Procedural Regulation, all incompatible aids granted in violation of the Art. 108 (3) are required to be recovered.[564]

It seems that the recovery of aid is the logical consequence of a finding that the aid is incompatible with the internal market and it follows from the word "*abolish*" of the Article 108 (2) TFEU.[565] The early jurisprudence referred to "*illegal aid*" rather than "*incompatible aid*", thus implying that the mere failure to notify State aid triggers the obligation to recover. The subsequent case law has clarified that the lack of notification does not give the EC the power to recover aid. In this regard, the incompatibility of the aid is a premise of the recovery order.[566]

The recovery aims to re-establish the internal market equilibrium that would exist if the incompatible aid had not to be granted.[567] To re-establish the situation that existed prior to the aid grant, a member state shall recover the interest accrued.[568] It is impossible to fully re-establish the *ex-ante* situation due to the possible exploitation of the advantage; therefore, the

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[560] Art. 16 of the Procedural Regulation.
[561] Case C-70/72 Commission v Germany ECLI:EU:C:1973:87.
[562] Ibid7, para 13.
[563] This trend has been confirmed by the CJEU case law. See, *inter alia*, Joined Cases C-328/99 and C-399/00, *SIM 2 Multimedia SpA*, ECLI:EU:C:2003:252, para 66 and Case C-403/10 *Mediaset SpA v European Commission*, ECLI:EU:C:2011:533, para 122.
[564] Art. 16 of the Procedural Regulation.
[565] Case C-70/72, *Commission v Germany*, (*Kohlegesetz*) [1973] ECR 813, para 13; Case C-310/85 *Deufil v Commission* ECLI:EU:C:1987:96, para 24; Case C-142/87 *Belgium v Commission* ECLI:EU:C:1990:125, para 66 and Case C-310/99 *Italy v Commission* ECLI:EU:C:2002:143, para 98.
[566] Case C-301/87 *France v Commission* (14 February 1990) ECLI:EU:C:1990:67 (*Boussac* case).
[567] EC Notice (n. 458), paras 16 et seq.
[568] Art. 14 (2) of the Procedural Regulation.

ultimate objective of recoveries is to end the distortion of competition.[569] The recovery is not qualified as a penalty, but it is the consequence of the finding that the aid is unlawful.[570] From a purely procedural perspective, the recovery follows a two-tier pattern: the EC and the member states. The EC has the power to order the recovery, and the member state has the duty to recover.[571]

3.2.6. Partial Conclusion

In this section, the overview of the State aid framework, particularly focusing on fiscal State aid, is provide. The first section explains the scope of the State aid law and the measures that are considered as State aid. The second section defines the criteria that must be met for a measure to be considered as State aid. The third section explains the procedural law and regulations governing State aid, including the decision-making process and the role of the EC. The fourth section explains when and how State aid is recovered and the circumstances under which taxpayers are protected from recovery. The conclusion highlights the importance of understanding both the substantive and procedural aspects of the State aid framework in order to fully understand the specific arguments made in the later sections of the thesis regarding the limited recovery based on the legal certainty principle.

3.3. EC Investigation on Dispute Avoidance Mechanisms: The Current Legal Uncertainties until the CJEU Final Judgments

3.3.1. Introduction

Tax rulings and other forms of dispute avoidance mechanisms are the OECD/IMF preferred solution to provide legal certainty and improve investment and trade.[572] The EC's investigations on tax rulings have inevitably highlighted that domestic forms of dispute avoidance mechanisms cannot eliminate State aid disputes or at least trigger the legitimate expectations and protect taxpayers form *ex-post* challenges.

This section is divided into seven sections. After the introductory part, the second section aims to clarify that the *ex-post* investigations of the EC have been forced to be on an *ex-post* basis depending on the circumstances of each case. Therefore, for a possible claim of the legal certainty protection, the main point is to clarify whether the *ex-post* and retroactive

[569] Case C-52/84, *Commission v Belgium*, ECLI:EU:C:1986:3, para 89. See also EC Notice (n. 458) para 61.
[570] See, *inter alia*, Case C-75/97, *Belgium v Commission*, ECLI:EU:C:1999:311, para 65 andCase C-183/91, *Commission v Greece*, [1993] ECR I-3131, para 16.
[571] EC Notice (n. 458) paras 21-25.
[572] See: 2.2.4.

interpretation was foreseeable or not. The third section follows the same pattern by arguing that the arm's length standard, as in principle all standards, gives content to the law on an *ex-post* basis. Therefore, not all content can be clarified on an *ex-ante* basis. From the fourth section onwards, the analysis covers the main legal uncertainties that are pending before the CJEU. The fourth part covers the EU arm's length principle, its content, and the related legal uncertainty of an external reference system. The fifth section covers the validity of the conjoint analysis of the advantage and selectivity. The sixth section covers the comparability between MNE and stand-alone entities. The last section concludes by supporting that EC's investigations on tax rulings have undermined the perceived ability of tax rulings to provide legal certainty. Moreover, the *ex-post* investigations have resulted in some uncertainty that has been debated in the legal literature, and these issues will probably remain uncertain until the respective CJEU judgments.

3.3.2. The *ex-post* Investigation on Tax Rulings: The Undermined *ex-ante* Legal Certainty

Since 2013, the EC has been scrutinising the compatibility of tax rulings granted to MNEs by their domestic tax administrations with EU State aid law.[573] The EC's scrutiny has resulted in final decisions to recover unlawful State aid granted by Luxembourg (to Fiat, Amazon, and Engie), the Netherlands (to Starbucks), Ireland (to Apple) and Belgium (to 35 MNEs via the "*excess profit"*).[574] Further investigations are still ongoing in relation to the UK, the Netherlands (IKEA, and Nike),[575] Luxembourg (Huhtamaki),[576] and again Belgium and its "*excess profit* "

[573] As regards tax rulings, see: 2.2.3, and 2.2.4. As regards the list of State aid investigations, see the State aid register at: http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html.The EC investigations were opened shortly after the US Senate hearing that triggered and informed the EC about possible misuse of tax rulings. See generally Offshore Profit Shifting and the U.S. Tax Code-Part I (Microsoft and Hewlett Packard) Hearing Before the Permanent Sub comm. on Investigations of the Comm. on Homeland Security and Governmental Affairs of the United States Senate, 1 1 2th Cong. 1 (2012). See also L. Wayne and K. Carr, 'Lux Leaks Revelations Bring Swift Response Around World', (Nov. 6, 2014), https://www.icij.org/investigations/luxembourg-leaks/lux-leaks-revelations-bring-swift-response-around-world/; M. C. Galizia et. al., 'Explore the Documents: Luxembourg Leaks Database', (Nov. 4, 2014), https://www.icij.org/investigations/luxembourg-leaks/explore-documents-luxembourg-leaks-database. Among all investigations, four were addressed to individual tax rulings: On 1st June 2014, the Commission opened proceedings with respect to the individual rulings issued by the Irish tax authorities on the calculation of the taxable profit allocated to the Irish branches of Apple Sales International and of Apple Operations Europe (aidNoSA-38373). On 11th June 2014, the Commission opened proceedings with respect to the individual ruling issued by the Dutch tax authorities on the calculation of the taxable basis in the Netherlands for manufacturing activities of Starbucks Manufacturing EMEA BV (aidNoSA-38374). On 11th June 2014, the Commission opened proceedings with respect to the individual ruling issued by the Luxembourg its tax authorities on the calculation of the taxable basis in Luxembourg for the financing activities of Fiat Finance and Trade (aidNoSA-38375). On 7th October 2014, the Commission opened proceedings with respect to an individual tax ruling to Amazon in relation to the computation of its corporate tax base in Luxembourg (aidNoSA-38944).

[574] The GC annulled the Commission's decision, which qualified the Belgian «excess profit» regime as State aid, stating that the Commission did not satisfy its burden to prove that the measure constituted a scheme. See T-131/16 *Kingdom of Belgium v. Commission*, ECLI:EU:T:2019:91.

[575] State aid SA.46470 (2017/NN) – Netherlands Possible State aid in favour of Inter IKEA; State Aid SA.51284 (2018/NN) – Netherlands Possible State aid in favour of Nike.

[576] State Aid SA.50400 (2019/NN-2) – Luxembourg – Possible State aid in favour of Huhtamäki.

on an individual basis.[577] The EC has investigated Gibraltar's ruling practice as a whole, assuming that it may constitute an aid scheme on the grounds of a discretionary exercise of powers.[578]

The factual patterns of the Decisions are complex and are out of the scope of this thesis. Thus, this part will not offer a detailed analysis of them. Moreover, the precise facts and circumstances to evaluate properly are kept secret for confidential reasons. It can be summarised that, in general, the EC investigations revolve around MNEs and the existence of tax rulings. In all instances, the taxpayer, who received the tax ruling, was a subsidiary or a branch of a larger group.[579] Those tax rulings confirmed that tax treatment of the investigated MNE by fixing the basis for the entities' remuneration,[580] fixing the amount of license and royalty fees,[581] accepting combinations of transactions between affiliated entities,[582] considering certain types of profit exempt following somewhat artificial calculations[583]or confirming the tax residency of the involved entities.[584] In the context of this brief factual analysis and the nature of the contested tax rulings, the State aid investigation boils down in establishing the existence of aid, and particularly that of the criterion of advantage, and in order to do that, it is necessary to calculate the taxes payable by the alleged beneficiaries in the absence of those APAs, and compare it with the taxes actually paid. However, due to the integrated nature of the beneficiaries, this exercise requires the application of TP rules and the arm's length standards. Besides the specificity of the single case, the main debated legal uncertainties are the following: i) the applicability and existence of an EU arm's length principle irrespective of domestic implementation, ii) whether the advantage and selectivity can be scrutinised conjointly, iii) the comparability between MNEs and stand-alone entities.

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[577] From SA.53964 Excess Profit Exemption by Belgium to Luciad to SA.54002 Excess Profit Exemption by Belgium to Knauf.

[578] Commission Decision of 1 October 2014, Case SA.34914 UK Gibraltar corporate tax regime. The final decision of recovery concludes that the tax ruling practice as such does not constitute an aid scheme, while individual aids have been granted on the basis of five tax rulings. See also Commission Decision of 19 December 2019, Case SA.34914 UK Gibraltar corporate tax regime.

[579] Commission Decision (EU) 2017/502 of 21 October 2015 on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to *Starbucks* [2017] OJ L 83/38, para. 141; Commission Decision (EU) 2016/2326 of 21 October 2015 on State Aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to *Fiat*, [2016] OJ L 351/1, para. 40–51; Commission Decision (EU) 2017/1283 of 30 August 2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to *Apple* [2017] OJ L 187/1, para. 39, 48–52; Commission Decision (EU) 2018/859 of 4 October 2017 on State Aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to *Amazon* [2018] OJ L 153/1, para. 100–105, 108; Commission Decision (EU) 2016/39 of 11 January 2016 on the excess profit exemption State Aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium [2016] OJ L 260/61, paras 13, 20–21; Commission Decision (EU) 2019/421 of 20 June 2018 on State Aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of *ENGIE*, OJ L 78/1 [2019] para. 19–22; Commission Decision (EU) 2019/1252 of 19 September 2018 on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of *McDonald's Europe* [2019] OJ L 195/20, paras 16–20.

[580] Commission Decision in *Starbucks* (n. 560), para. 40–43; Commission Decision in *Fiat* (n. 560), paras. 54–57 ; Commission Decision in *Apple* (n. 560), paras. 39, 59–62

[581] *Amazon* (n. 560), paras. 126–128.

[582] *ENGIE* (n. 560), para. 26.

[583] *Belgian Excess Profits* (n. 560), paras. 13–15 and 18. See also T. Jaeger, 'Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?' (2017) 8 Journal of European Competition Law and Practice 221, 224.

[584] *Amazon* (n. 560), paras. 125–126; *McDonald's* (n. 560), para. 34–38.

Most of the cases have been already judged by the GC, and none has yet reached the CJEU. Therefore, some legal issues are still uncertain.[585]

The EC investigations on tax ruling practices have raised concerns since they have undermined the tax ruling's essence, which is providing *ex-ante* legal certainty.[586] Particularly, a group of U.S. senators expressed their concerns about the EU investigations that seemingly target U.S. companies. Most importantly, they claimed that "*the retroactive effect of these State aid investigations (…) plainly undermines legal certainty and the rule of law*".[587] For example, the Irish Finance Minister at the time, Michael Noonan, issued a strong statement criticising the decision and accusing the EC of halting international progress in the area of tax avoidance and tax evasion reforms and introducing uncertainty for companies doing business in Europe.[588] The U.S. Department of the Treasury has also issued a statement criticising the decision as "*unfair*" and "*contrary to well-established legal principles*". The criticism was focused on the problems that arise as a result of the EC's State aid decisions, which include introducing uncertainty into the international tax systems via retroactive tax assessments. Such investigations have global implications for the international tax system and the G20's agenda to combat Base Erosion and Profit Shifting ("BEPS") projects and the G20 tax certainty agenda.[589]

Effectively, among all dispute avoidance mechanisms, tax rulings are the OECD/IMF suggested solution to provide certainty by clarifying *ex-ante* TP transaction in compliance with the arm's length standard.[590] They have been used to provide certainty about the tax implications of investments and transactions in advance of companies proceeding with them.[591] The tax rulings mechanism reduces the inherent uncertainty of standards by providing

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[585] As regards the issue of legal certainty, See: 2.5.2. As regards the GC judgments, see Joined Cases T-778/16 and T-892/16, *Ireland v. Commission*, ECLI:EU:T:2020:338,(Apple); Joined Cases C-760/15 and T-636/16, *The Netherlands v. Commission*, OJ C 413, 9.12.2019, p. 40–40, (Starbucks); Joined Cases T-755/15 and T-759/15, *Luxembourg v. Commission*, ECLI:EU:T:2019:670, (Fiat); Joined Cases T-131/16 and T-263/16, *Belgium v. Commission*, ECLI:EU:T:2019:91, (Excess profit cases); Cases T-816/17 and T-318/18, *Luxembourg v. Commission*, ECLI:EU:T:2021:252, (Amazon) and Joined Cases T-516/18 and T-525/18, E*ngie v. Commission*, ECR I-0000, not yet reported

[586] A. Bal, 'Tax Rulings, State Aid and the Rule of Law', in R.F. van Brederode (ed) *Ethics and Taxation*, (Spinger 2020), 359-377; Richard (n. 35); A. Taferner and J. Wouda Kuipersu, 'Tax Rulings: In Line with OECD Transfer Pricing Guidelines, but Contrary to EU State Aid Rules?', (2016) 56(4) European Taxation, 1-23. L. Liu, 'Is American Multinational Enterprises' Honeymoon with the European Union Over? An Analysis of the European Commission's Investigations into American Multinational Enterprises' Tax Deals with Ireland, Luxembourg and the Netherlands', (2018) 41 Loy. L.A. Int'l & Comp. L. Rev. 71; C. Bobby, 'A Method inside the Madness: Understanding the European Union State Aid and Taxation Rulings',(2017) Chicago Journal of International Law Vol. 18, No. 1, Article 5. A. Haines and A. Schwanke, 'Multinationals and the EC Engulfed in State Aid Disputes', (2016) 27 Int'l Tax Rev. 27.

[587] U.S. Dep't of Treasury, White (n. 35); See also Robert Stack, 'Treasury Releases White Paper on European Commission's State Aid Investigations into Transfer Pricing Rulings', U.S. DEP'T OF TREASURY (Aug. 24, 2016), https://www.treasury.gov/connect/blog//Treasury-Releases-White-Paper-on-European-Commission%E2%80%99s-State-Aid-Investigations-into-Transfer-Pricing-Rulings.aspx,

[588] In May 2017, the Finance Minister Noonan stepped down from his leadership position after six years in power. See Vincent Boland, 'Irish Finance Minister Michael Noonan to Step Down', FIN. TIMES (May 18, 2017). See also Liu, (n. 567).

[589] White Paper (n. 35); Stack (n. 568).

[590] See: 2.2.4.

[591] Givati (n. 121). N. Hrushko, 'Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU member states' Tax Rulings', (2017) Brooklyn Journal of International Law, Volume 43, Issue 1, Art. 32.

content to the law before the taxpayer acts. Tax rulings, compared with other dispute avoidance mechanisms, usually fulfil all requirements needed to trigger the protection of legitimate expectations, at the domestic level at least. Since tax rulings (such as APAs) are agreed in advance, the future fact projected at the time of the agreement can be verifiable only after the taxpayer's action. If a taxpayer acts as agreed in the rulings, the domestic tax administration is supposed to follow the *ex-ante* content agreed in advance.

Within the EU State aid legal framework, domestic tax rulings are not able to provide *ex-ante* certainty for two main reasons.[592] First, domestic tax rulings cannot provide legitimate expectations as regards EC State aid investigations; second, the EC is forced to investigate *ex-post* since it can know unnotified and secret rulings can be known only on an *ex-post* basis.

About the first reason, although tax rulings provide certainty under the domestic legal framework, they do not provide certainty concerning the EU State aid investigations since only an EC's act or behavior can create legitimate expectation and provide certainty.[593] The only viable way to obtain certainty is through the member state's notification and the EC's subsequent approval. When a member state decides that a notification is not necessary, a taxpayer cannot oblige the member state to notify, and it cannot rely on the certainty provided by the domestic ruling. Moreover, a taxpayer cannot rely on the legitimate expectation that the member state is going to notify the measure since, according to settled case-law, a "*diligent taxpayer*" should normally be able to determine whether that procedure has been followed.[594] The current EC *ex-post* investigations on tax rulings (particularly APAs) have highlighted this sort of inability of tax rulings to provide early certainty within the State aid legal framework.

About the second reason, the *ex-post* investigations have been forced of being ex-post by the circumstances of the case. All of the state cases at stake are unlawful since the member states have not notified tax rulings by following the notification procedure. [595] All of the tax rulings are "*new aid",* which under the State aid Procedural Regulation are required to not be put into effect (stand-still obligations).[596] The EC became aware of the rulings via other investigations, such as the US government, other via claims submitted by other interested parties.[597]Moreover, at that time, DAC 2 was not in force and tax administrations do not have

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[592] See: 4.6.3.1.

[593] See the Decision OJ L 282 of 17/02/03, when the EC granted to the Belgium a transitional period, in order to adjust the coordination center regime that was previously notified and approved but no longer compliant. Although Germany, France, Luxembourg and Spain implemented similar measure without prior notification, the EC decided not to order recovery since the approval of the Belgian measure was announced publicly. See on the contrary: R. Fadiga, Of Apples, Cars, And, Coffee – Against the Commission's Remedy to Unlawful Tax Rulings, European Journal of Legal Studies, Vol.10, No.2, 2021.

[594] Case C-169/95, *Kingdom of Spain v Commission*, ECLI:EU:C:1997:10, para 51. Case C-5/89, *Germany v Commission*, ECLI:EU:C:1990:320, paras 13 and 14. C-24/95, *Germany v Commission*, ECLI:EU:C:1997:163, para 25.

[595] Unlawful aid means new aid put into effect in violation of Art.108(3) TFEU, namely when MS has not complied with the obligation of notification, or with the standstill clause; See:3.2.3.

[596] See:3.2.3. See also Article1(f) of 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, OJL248, 24 September 2015, 9–29.

[597] U.S. Dept't of Treasury, U.S. Department of the Treasury, White Paper: The European Commission's recent State aid investigations of transfer pricing rulings (Aug. 24, 2016); As regards the Luxleaks database, see the ICIJ - http://www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database. The disclosure of

an obligation to automatic exchange information concerning their domestic tax rulings.[598] Therefore, the EC has no possibility to know *ex-ante* the possible violation of EU State aid law.

In any case – except via the notification - the contested *ex-post* investigations cannot be conducted ex-ante. The ex-post nature of the current investigations was caused by the circumstances of the case. However, the point is not about the "*ex-post*" per-se, but it is about the potential lack of legal certainty that might be created from a more expansive interpretation of the CJEU (confirming the EC's interpretation) taking into account that the requirement to recover aid may extend to up to the ten previous years, namely a retroactive interpretation that may be unforeseeable at the time when the measure was enacted.

3.3.3. The *ex-post* Content of the Arm's Length Standard: A Tool? A Principle? A Rule? A Standard?

This section aims to clarify the nature of the arm's length standard and its relation to time. The analysis of whether it is a tool, a principle, rules, or standards is relevant to understand the impossibility to pursue an ex-ante certainty in the current State aid legal framework.

The generic statement of the arm's length standard is laid down in paragraph 1 of Art. 9 of the OECD Model Tax Convention, which is the basis of bilateral tax treaties of OECD member countries and other non-member countries.[599] The article provides that: "*Where conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly*".[600] The arm's length standard creates a *legal fiction* that imposes the taxation of MNEs as they were independent legal entities governed by the market forces.[601] When independent enterprises transact with each other, the condition of their commercial and financial relationships are determined by the market forces.[602] Hence, tax administrations can rely on the market forces' mechanism. The same reliance cannot be allocated when associated entities transact with other interest,

interested parties has been denied by the EC. See, *inter alia*, Amazon case. As regards Nike, see https://www.icij.org/investigations/paradise-papers/swoosh-owner-nike-stays-ahead-of-the-regulator-icij and Press Release N.124/21 GC of the EU, *Nike European Operations Netherlands and Converse Netherlands v Commission*, 14 July 2021

[598] See Council Directive (EU) 2015/2376 (n. 224). The ruling information exchanged will be filed with the Commission's Directorate-General (DG) Taxud for the Member States to consult confidentially. DG Competition is not supposed to become acquainted with the information: Article 23a (1) of the revised DAC3 provides that information communicated to the Commission pursuant to this Directive shall be kept confidential by the Commission and may not be used for any purposes other than those required to determine whether and to what extent Member States comply with this Directive.

[599] OECD Model Tax Convention on Income and on Capital (n. 104): Art. 9 (1).

[600] Ibid.

[601] For an historical perspective, see Andrus and Collier (n. 15).

[602] OECD TP Guidelines 2017 (n. 11) Chapter 1, para 1.2.

such as reducing the total taxpayer's income. Under the arm's length principle, controlled transactions within a group are compared to transactions between unrelated entities under comparable circumstances to determine acceptable transfer prices[603].
Having clarified the generic content of the arm's length principle, the first question that should be answered is whether the arm's length is a "*tool*". The EC labelled the arm's length principle as a "tool" for assessing the price level of intra-group transactions.[604] The GC uses the same terminology.[605] Peters highlights that the use of the word "*tool*" is a solution that both EU institutions are proposing to make clear that the arm's length standard should first of all be seen as an instrument to give substance to the existence of an advantage within the meaning of the Art. 107(1) TFEU.[606] The term "*tool*" is not exactly a legal term. However, in legal science, principles and standards are well-known terms. The term "*tool*" appears to be a solution to avoid other legal questions that would have asked if the term "rules" (for example) had been used. Which rules? Domestic? Which principle? EU or international? Moreover, the term "tool" (different from rules and standards) does not bring any clarity in respect of time, and in respect of its legal applicability.

On the contrary, the question of whether the arm's length is a "principle" brings more answers about the relation with time and its applicability.[607] First, about the arm's length applicability, Art. 9 of the OECD Model of Tax Convention is qualified as soft-law, therefore not-binding. The Contracting States "*may*" implement the Model in their jurisdictions via hard law, and they must rely on domestic tax law as the authority to levy taxes since tax treaties generally do not broaden taxing rights.[608] There is no customary obligation to enter into a double tax treaty, and there is no binding obligation to comply with the content laid down in the OECD Model. The OECD seems to be of the same view since the report on harmful tax competition assumes that Art. 9(1) does not contain a treaty obligation to invoke and apply the arm's length principle.[609] In 1992, the IFA Congress addressed the nature of the Art. 9(1).[610] According to the General Reporter Guglielmo Maisto, Art. 9(1) is a "*possibility*" provided by the treaty of a

[603] Kato and Okoshi (n. 13).
[604] Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Starbucks v. European Commission*, ECLI:EU:T:2019:669, para 138. See also Joined Cases T-755/15 and T-759/15, *Fiat v. European Commission*, ECLI:EU:T:2019:670, para 143.
[605] Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Starbucks v. European Commission*, ECLI:EU:T:2019:669, paras 151, 152, 157, 163, 169 and 199.
[606] C. Peters, 'The Starbucks Decision of the General Court (Cases T-760/15 ant T-636/16)', in M. Lang et. al (eds.), *CJEU Recent Developments in Direct Taxation* (Linde Verlag, 2020), 6. See also, C. Peters, Critical Analysis of the General Court's 'EU Arm's Length Tool': Beware of the Reflexivity of Transfer Pricing Law!, EC Tax Review, Vol. 31, Issue 1 (2022), pp. 30-49.
[607] J. Scott Wilkie, 'Reflecting on the "Arm's Length Principle": What is the "Principle"? Where Next?', in W. Schon and K. A. Konrad (eds), *Fundamentals of International Transfer Pricing in Law and Economics*, (Springer, 2012),137; B. D. Lepard 'Is the United States Obligated to Drive on the Right? A Multidisciplinary Inquiry into the Normative Authority of Contemporary International Law Using the Arm's Length Standard as a Case Study', (1999) Duke Journal of Comparative & International Law43, 57–58.
[608] There is a major consensus that Art. 9 does not provide broad taxing rights: see, *inter alia*, Wittendorff (n. 107).
[609] OECD, Harmful Tax Competition: An Emerging Global Issue (OECD, 1998), para. 71
[610] G. Maisto, 'General Report on Subject I: Transfer Pricing in the Absence of Comparable Market Prices', (1992) Cahiers de droit fiscal international, Vol. 77a , 19, 60 et seq. (46th Congress of the International Fiscal Association, Cancún, 1992)

restrictive nature. He also noted that most reports considered Art. 9(1) to be illustrative, but no report supports the arm's length as a principle. The non-obligation to follow the arm's length as a principle is expressed by the specific term "*may*" set out in the Art. 9 OECD MTC. The use of the verb "*may*" supports the interpretation that Art. 9 of the OECD Model of Tax Convention allows, but does not requires, taxation of MNEs as they would have been independent.[611] The application of Article 9 is a choice of the contracting states, and their different application of the arm's length standard confirms that there is no unique concept that can be considered binding.[612] The appropriateness to treat the intra-group transaction equivalent to those between independent entities does not justify a mandatory requirement.[613] The OECD itself defines the arm's length as a standard, "*which is the international transfer pricing standard that OECD member countries have agreed*".[614] Moreover, the arm's length based TP rule is among many possible TP rules.[615] The specific, multiform, and the non-binding nature of the arm's length principle supports the argument that the arm's length is not a principle.[616]

Continuing about the eventual arm's length applicability, it is worth clarifying whether the arm's length principle can be considered an "*EU principle*". One of the main uncertainties in the recent State aid case is whether there is an obligation to comply with the EU arm's length principle. [617] This part aims to answer whether the arm's length can be considered an EU law principle. The EU principles are enshrined in the EU Treaty, developed by the European Court of Justice, or part of the common constitutional principle of the member states. The EC Notice develops this interpretation of the arm's length principle, which "*necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a member state has incorporated this principle into its national legal system and in what form*".[618] Art. 107 (1) has never been mentioned as one of EU law principles. The EC itself has analysed EU State aid cases under the principle of non-discrimination.[619]In that

[611] OECD 2017 Model of Tax Convention, Art. 9.

[612] Nielsen et al demonstrate how different corporate tax systems, separate accounting and formula apportionment affect transfer prices differently. See S. B. Nielsen, S. B., Raimondos-Møller and G. Schjelderup, 'Formula Apportionment and Transfer Pricing under Oligopolistic Competition. (2003). Journal of Public Economic Theory, 5(2), 419–437.

[613] For some criticism to the arm's length principle, see Biegalski (n. 14). This sort of appropriate treatment is a suggestion based on the fact that the standard may be viewed in light of one of the purposes of the OECD Model and tax treaties to facilitate international trade and investments: see para. 7 of the Commentary on Art. 1 of the OECD Model; Art. 1 of the Convention on the Organisation for Economic Co-operation and Development, Paris, 14 December 1960.

[614] *OECD TP Guidelines 2022*, para 1.1.

[615] J. Owens, 'Income Allocation in the 21st Century: The End of Transfer Pricing? Should the Arm's Length Principle Retire?', (2005) International Transfer Pricing Journal 99; H. Hamaekers, 'Arm's Length – How Long?', (2001) International Transfer Pricing Journal 30

[616] In the same vein, Haslehner supports arguments that demonstrate that the arm's length standard is not a principle. He also specifies that it is not misleading to call the arm's length "principle" due to the fact that it is the common choice in most countries. Cf. W. Haslehner, 'Transfer Pricing Rules and State Aid Law, in C. HJI Panayi, W. Haslehner E. Traversa (eds) *Research Handbook on European Union Taxation Law*, Ed., (Edward Elgar, 2020), 431.

[617] See: 3.3.3. see also Haslehner (n. 55)144–56; P.J. Wattel, 'Stateless Income, State Aid and the (Which?) Arm's Length Principle', (2016) 44 Intertax 11, 791–801.

[618] Commission Notice (n. 24), para 172.

[619] See EC Decision SA.38374, *Starbucks*, para 264, where the EC states that "it is a general principle of equal treatment in taxation falling within the application of Article 107(1) from whose scope the national tax rules are not excluded". See also

regard, it must be observed that the principle of equal treatment or non-discrimination, which is one of the general principles of Union law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[620] The equality principle does not specify what can be considered comparable as the arm's length principle does. Similar to State aid cases, within the EU fundamental freedoms, the CJEU's decisions dealing with the arm's length principle are based directly on the fundamental freedoms rather than a breach of a self-standing arm's length principle.[621]Under EU law, the non-arm's length TP can be justified in many situations.[622] The CJEU confirmation of the compatibility of TP adjustment under the arm's length standard does not make the standard a principle.[623] More specifically, the current State aid case law on TP does not identify the arm's length standard with a univocal definition. In the *Starbucks* case, the GC described the arm's length as a "*useful tool*",[624] a "*benchmark*",[625] and a "*methodology*" to check whether taxable profits of MNEs corresponds to a reliable approximation of a taxable profit generated under market conditions.[626] Moreover, the Fiat Case has clarified that there is not an EU arm's length principle enshrined in Art. 107.[627] It is possible that the use of "*tool*", as previously introduced, is determined by the impossibility to affirm that the arm's length is an EU principle.

Furthermore, the arm's length standard cannot be considered a common principle of the EU member states since at the time of the EC investigation, not all member states have embodied the arm's length standard in their domestic laws.[628] Moreover, some domestic legislations apply the arm's length standard only to cross-border transactions in the absence of mandatory group consolidation.[629] Even by considering an eventual common arm's length principle, the arm's length standard applies exclusively to related and associated enterprises.[630] The

Szudoczky (n. 35)469; C. Micheau, 'Fundamental Freedoms and State Aid Rules under EU Law: The Example of Taxation', (2012) 52 Eur. Tax. 210.

[620] Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, para 63, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para 95.

[621] See Case C-324/00, *Lankhorst-Hohorst*, EU:C:2002:749; Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, EU:C:2007:161; Case C-311/08, *SGI*, EU:C:2010:26; Case C-382/16, *Hornbach-Baumarkt AG* v. *Finanzamt Landau,* EU:C:2018:366.

[622] W. Schon, *Transfer Pricing, the Arm's length Standard and European Union Law, in Allocating Taxing Powers within the European Union*, (Springer 2013); See also HJI Panayi (n. 538), 366; S. Buriak and R. Petruzzi, 'Transfer Pricing Rules under the CJEU's Scrutiny: Green Light for Non-Arm's Length Transactions?' (2018) International Transfer Pricing Journal, Sept/Oct 2018, 360.

[623] Case C-311/08 *Société de Gestion Industrielle* ECLI:EU:C:2010:26; see also the annotations by P. Baker, 'Transfer Pricing and Community Law: The SGI Case', (2010) 38 Intertax 194-196.

[624] Case T-760/15 & T-636/16, *The Netherlands v Commission*, ECLI:EU:T:2019:669, paras. 151, 152, 157, 163, 169 and 199. See also Case T-755/15 & T-759/15, *Fiat* ECLI:EU:T:2019:670 , ECLI:EU:T:2019:670, para. 130, 143, 144, 151, 155, 159, 162 and 207.

[625] Starbucks Case, para. 151; See also Fiat Case, paras. 143 and 296.

[626] Starbucks Case, para. 152, 154 and196. See also Fiat Case, para. 132, 146, 420, 427

[627] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, paras 102-104.

[628] Joined Cases T-778/16 & T-892/16, *Ireland v. Commission*, ECLI:EU:T:2020:338, para 225.

[629] Buriak and Petruzzi (n. 604)352

[630] Art. 9 of the OECD Model Convention on Income and Capital, 2017.

applicability of the principle derives from the qualification of the related and associated enterprise. Since there is no harmonisation under EU law as to the definitions of related companies,[631] we cannot consider the arm's length as a common principle of the EU member states.[632]

Having clarified that the arm's length standard is neither an international nor an EU principle, its qualification as a "*standard*" completes the analysis of this section. In particular, this part covers its applicability and its relation with time. As a result, it is argued that when tax cases boil down the arm's length standard there will be, by definition, negative consequences for an ex-ante certainty.

It is generally assumed that legal "*rules*" provide the benefits of certainty and predictability, while legal standards flexibility by allowing the law's development.[633] The rule of law implies a preference for rules over standards since the latter does not inform people what is permitted and what is not permitted, but it provides them just an orientation.[634] A system committed to the rule of law is committed to adopting rules that can narrow, or even eliminate, the uncertainty faced by taxpayer attempting to follow the law, rather than committed to the goal of making every decision according to judgments fully specified in advance. This clarification or the reduction of possible misunderstanding is a significant step to promote predictability and planning.[635] The ideal represented by the rule of law is that law should inflict punishment only on people, who engage in actions that conform to general classifications identified by that law. Not on people who engage in actions or have characteristics that the authorities conclude are undesirable after the fact. On the contrary, the legislature (by issuing a standard) announces in advance of the regulated conduct that anyone who engages in that conduct risks a sanction. In practice, this enactment does not clarify every situation permitted or not.[636] In 1944, Hayek condemned the use of vague legal standards like "*reasonableness*" or "*fairness*". "*One could write a history of the decline of the Rule of Law, […] in terms of the progressive introduction of these vague formulas into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of […] the law and the judicature*".[637] Dworkin considers rules as "*applicable in all-or-nothing fashion*" when they are drafted to include all of their exceptions.[638] In this regards, "*principles*" are similar to "*standards*" since they state a reason that argues in one direction but without prescribing the particular specificity. Principles and standards have the advantage of facilitating laws' development

[631] For a comparative view, see J. Wittendorff, '*Transfer Pricing and the Arm's Length Principle in International Tax Law*', (Kluwer, 2010), 21-248.

[632] In the AG's opinion in Case C-898/19 P Ireland v. Commission 2021, the AG Priit Pikamäe reasoned that the GC does not mean that the arm's length principle derives from Art. 107 (1) of the TFEU, and the arm's length principle may only if the principle is incorporated in domestic law.

[633] E.A. Posner, 'Standards, Rules, and Social Norms', (1997) 21 Harv. J.L. & Pub. Pol'Y 101, 113. Raban supports a contrary opinion by arguing that "*bright-line*" rules foster predictability worse than standards and its argument consists in the missing differentiation between identifying people's ability to predict the consequences of their actions with lawyers' ability to predict the consequences of applying the law. See O. Raban, 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism' (2010) 19 Boston University Public Interest Law Journal175.

[634] Posner (n. 613)113.

[635] Sunstein (n. 173), 1021–22.

[636] Posner (n. 613), 113.

[637] B. Caldwell, *The Collected Works of F.A. Hayek, Vol. II, The Road to Serfdom*, (Routledge, 2008), 116.

[638] R. M. Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 25.

without changing the wording. Raz clearly expresses this idea: "*Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behaviour because they are more certain than principles and lend themselves more easily to uniform and predictable application*".[639]

Regarding *ex-ante* certainty, "*standards*" (and principles) have a negative effect compared to "*rules*". The main difference between rules and standards is that with rules, the law is given content before the taxpayer acts, and with standards, the law is given content after the taxpayer acts.[640] For example, a rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator. The common example is that rules might prohibit driving over 50 km/h on streetways. Standards may entail leaving both specifications of what conduct is permissible and factual issues for the adjudicator. A standard might prohibit driving at a reasonable speed on streetways. When a lawmaker enacts a rule, it aims to clarify in advance of some possible action whether that action will be penalised. When a lawmaker enacts a rule, it aims to clarify whether that action will be penalised in advance of some possible action.[641] In this regard, the arm's length standard is even more complicated. Under the arm's length standard, the taxpayer is in a car without a speedometer, and the arm's length standard prohibits driving over the speed range of the other comparable cars transiting in the same streetway. In this case, the standard's content is determined not only by the taxpayer action but also by the other taxpayers' comparable situations. Although the arm's length results have changed during the COVID-19, TP rules have remained the same.[642] The taxation of MNE has changed since the value of the comparable transactions has changed.[643] By still referring to the car example, a snowstorm has changed the law's content without changing its wording. Kaplow highlighted the negative effect of the application of standards as the difficulty of prediction, in contrast with rules application.[644] Within the TP transactions, the quest for early predictability is frustrated by the essence of the arm's length principle and its standard's nature. The degree of uncertainty can be divided in 3 levels: (i) The application and interpretation of the wording used to embody the arm's length standard; (ii) the comparables used by the tax administration to calculate the compliant range of acceptable profit, (iii) the actual facts of the MNE that will be used to calculate the link with the comparables. Tax rulings, and APAs more specifically, even at the domestic level, provide certainty only about the first two points since they agreed *ex-ante* on legal interpretation and declared facts. In particular, the declared facts by the MNE should be consistent with the *ex-post* actual fact. In this regard, from the legal certainty perspective, it is relevant to protect *ex-*

[639] Raz (n. 167), 841.
[640] H.L.A. Hart, *The Concept of Law*, (Oxford University Press, 1961), 127-129; H. M. Hart and A. M. Sacks, *The Legal Process*, (unpublished manuscript, 1958), 157; L. Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J., 1992, pp, p.560.
[641] Kaplow (n. 620), 624-29, where the author also observes while rules are less costly than standards to interpret and apply, their creation are costlier.
[642] J. White and M. Cruz Cano 'Doubts over Arm's Length Pricing Rise amid COVID-19', (2020) International Tax Review. G. Perotto, 'How To Cope with Harmful Tax Competition in the EU Legal Order: Going Beyond the Elusive Quest for a Definition and the Misplaced Reliance on State Aid Law', (2021) EJLS 13(I), 309-340.
[643] A. Ball, 'TP Adjustments and Customs Duties in a post-COVID-19 Environment', (2020) International Tax Review.
[644] L. Kaplow, 'The General Characteristics of Rules', in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, vol 5*, (Elgar, 2000), 512-3.

post facts that confirm the declared fact but that are investigated because of a change of interpretation of the law ex-ante interpretation agreed on the APA.

In conclusion, whether the arm's length principle should be qualified as a tool, principle, rules or standards is a current legal uncertainty. A certainty can be still founded in the arm's length inherently incapability to provide *ex-ante* legal certainty.

3.3.4. External Reference System: The EU Arm's Length Principle

The arm's length standard has been at the heart of the current state investigation of TP transactions.[645] One of the uncertain points is whether the arm's length standard derives directly from the EU State aid provisions (the so-called "*EU arm's length principle*"),[646] and the second uncertainty is the content of the applied arm's length.[647]
The EC has introduced a "*sui generis*" EU arm's length principle, which is the application in the TP area of the equality principle enshrined in article 107(1) TFEU.[648] In the EC's view, the "EU" arm's length principle "*necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a member state has incorporated this principle into its national legal system and in what form*".[649] Under this interpretation, the arm's length standard is an expression of the prohibition of discrimination and unequal tax treatment of undertakings in a similar factual and legal situation.[650] The EC is aware that it cannot enforce the OECD soft law guidance. Therefore, the source of such obligation to comply with the arm's length must flow directly from the Treaty and is irrespective of national law, and independently from the OECD TP guidelines (although the compliance with the OECD guidelines it is "*unlikely*" to produce State aid).[651] Although the application of the EU arm's length standard irrespective of national law, it can only be applied in tax systems that are based on the separate entity approach.[652] The EC has not clearly substantiated arguments

[645] See EC Decision of 21 October 2015 on the Netherlands' tax treatment of Starbucks, SA.38374, C(2015) 7143 final para. 246; EC Decision of 21 October 2015 on Luxembourg's tax ruling to Fiat Chrysler Finance, SA.38375, C(2015) 7152 final , para. 228; EC Decision of 11 January 2016 on the Excess Profit Exemption State Aid Scheme, SA.37667, C(2015) 9837 final, para. 150; EC Decision of 30 August 2016 on Ireland's tax treatment of Apple, SA.38373, C(2016) 5605 final, paras. 249–257; EC Decision of 4 October 2017 on Luxembourg's tax ruling for Amazon, SA.38944, C(2017) 6740 final..
[646] See Commission Notice (n. 24), para. 172. See also Wattel (n. 599)791–801; Haslehner (n. 55)144–56.
[647] See, *inter alia*, Amazon Decision, para. 596.
[648] Commission Notice (n. 24), para 172. See also R. Mason, 'State Aid Report, Part.6: Arm's Length on Appeal', (2018) Tax notes, 771.
[649] Commission Notice (n. 24), para 172.
[650] J. Rapp and R. Janus, 'Institutional Report, in Taxation, State Aid and Distortions of Competition' in J.L. Vilaca et al. (eds.), (Edicoes Almedina 2018), p. 140.
[651] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (n. 11). See also Commission Notice (n. 24) para. 18.
[652] Pursuant the OECD TP Guidelines, the separate entity approach is one of the fundamental ALP's concepts. It demands that each entity part of the same group should be treated as separate legal entities that pursue their own interests. Companies forming part of a group are considered taxable entities distinct from the group to which they belong: See OECD TP Guidelines, para 1.6; A national tax system subjecting income from corporations to taxation can only be in itself consistent and have an "inner logic" if it treats both group companies and independent companies equally on the basis of the ALP: See A. Miladinovic and R. Petruzzi, 'The Recent Decisions of the European Commission on Fiscal State Aid: An Analysis from a Transfer Pricing Perspective', (2019) 26(4) International Transfer Pricing Journal, 223-234.

about the mandatory obligation to apply the arm's length within EU. It has preferred to support its arguments, the soft law guidance, and in its decisions, by relying on the cases of C-182/03 and C-217/03 (Belgium and Forum 187 Case).[653] Particularly, the EC refers to this judgment when the Court made reference to the "*condition of free competition*", namely: "*In order to decide whether a method of assessment of taxable income such as (…) the regime for coordination centres confers an advantage on them, it is necessary, (…), to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition*".[654] The reliance of only one judgment and the Court non explicit reference to the arm's length principle has generated debates and doubts about a general member state's obligation to apply an EU arm's length principle.[655]

The Forum 187 case apart, in the EC's view, the EU arm's length principle in application in the TP area of the equality principle is enshrined in Article 107 (1) TFEU.[656] The EC seems to rely on the assumption that Advocate General Cosmas pointed out that "*the prohibition of State aid appears as the result of the general principle of equality and the rule derived from it that a like rule should apply*".[657]The equality theory suggests that what is essentially different must be treated differently by legal norms.[658] A study for the ECON Committee considers the "*essential*" for the invocation of the principle of equality that the APAs equally accessible and the uniformity of their policy to rule must be granted so that a similarity test can be applied. In order to establish this legal framework, then is necessary (i) to publish procedural steps and the general policy on granting, refusing and revoking tax rulings. In this way, it is rendered difficult for tax authorities to deviate randomly from administrative (legal) policy rules; (ii) the equality before the law must be guaranteed under the general principle based on Article 14 of the ECHH, and (iii) the parties must be able to invoke the principle of equality as a principle of proper administration as well.[659] The equality principle (and fair competition) is also expressed in the OECD Guidelines, which, in their description of the role of the arm's length principle, include the parity of treatment, and the placing of MNEs and independent enterprises on an equal footing for tax purposes, thereby avoiding both advantages and disadvantages that may "*distort competition*".[660]

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[653] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission*, ECLI:EU:C:2006:416, para 81. See also Case T-538/11 *Belgium v. Commission*, EU:T:2015:188, paras 65 and 66 and the case-law cited.

[654] Ibid paras 95 and 96

[655] Luja highlights that the CJEU did not define the "conditions on free competition"; see Luja (n. 388); Rossi Meccanico argued that in the Forum 187 case the court was arguing about the advantage and not selectivity: See P. Rossi-Maccanico, 'A New Framework for State Aid Review of Tax Rulings', (2015) 14(3) EStAL 371,376 See similarly Monsenego (n. 67)30. See also Nicolaides (n. 519), 420 where the author argued that a correct interpretation of the Forum 187 case is that a company should cover all its costs, and not earning at arm's length profit; S.M. Gonzalez, 'State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings', (2016), 15 European State Aid Law Quarterly 556, 564; Kyriazis (n. 388)435; T. Joris and W. De Cock, 'Is Belgium and Forum 187 v. Commission a Suitable Legal Source for an EU "At Arm's Length Principle?', (2017), 16 European State Aid Law Quarterly 607, 614.

[656] Commission Notice (n. 24), para 172. See also Mason (n. 628)771.

[657] Opinion of Advocate General Cosmas, Case C-353/95 P *Tiercé Ladbroke SA v Commission*, ECLI:EU:C:1997:596, para 30.

[658] L. Gianformaggio, *Eguaglianza, donne e Diritto*, (Il Mulino, 2005), 33.

[659] European Parliament, Directorate-General for internal policies, Policy Department, Economic and Monetary affairs, Tax Rulings in the EU Member States, Study of the ECON Committee, (2015), 6.

[660] *OECD TP Guidelines 2022* (n. 11) para. 1.8.

Part of the legal literature supports that intrinsically Art.107 is about equality, and when they argue that the selectivity test, as it requires that similar situations be treated in the same way, appears to be the application of the general principle of equal treatment in the context of the State Aid rules.[661] However, the correspondence between the equality principle with the arm's length standard has attracted criticism.

Wattel categorizes the EU arm's length principle (as interpreted by the EC) as a part of EU competition law that should be distinguished from the arm's length principle that is known in domestic and international rules, since it aims "*at protecting a level playing field for all economic operators in the internal market, i.e. at protecting free competition, rather than at tax base protection or prevention of double taxation*".[662] In *Starbucks*, the GC shares the same view.[663]Haslehner argues that a different treatment cannot be defined in the abstract, especially if the objective of the tax system is relevant.[664] Daly, and other authors, have taken the perspective of trust, namely the relationship between member states and EU, and as such whether there are EU rules on taxation, which override domestic law, such as an autonomous EU arm's length principle; also whether member states' tax authorities should have some margin of appreciation when it comes to administering complex laws.[665] Galendi Junior has stressed the inconsistencies that arise from the supranational reference system by arguing that deriving an EU arm's length principle from Art. 107(1) TFEU creates a supranational reference system, which is not an obvious derivation from the equality principle, but a matter of allocation of taxing rights among jurisdictions.[666] De Broe has analysed the previous case law, where the CJEU assesses the advantage via a comparison with the normal reference system of the State under consideration,[667] and, therefore, no comparison with a hypothetical ideal tax system, or even with the tax system of another member state, should be expected.[668] Buriak and Lazarov have argued that a hypothetical tax system embedded in Article 107 would amount to a *de facto* harmonisation of the tax area by means of administrative practices.[669] It is generally understood that Article 9 OECD MTC is not "*self-executing*" as it requires domestic

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[661] Lenaerts (n. 477)336; Lang (n. 477),420. P. Rossi-Maccanico, 'A Proposed Framework to Review Tax Rulings under State-Aid Rules', in W. Haslehner, G. Kofler and A. Rust (eds), *EU Tax Law and Policy in the 21st Century* (Kluwer, 2017),72.

[662] Wattel (n. 599)791-801.

[663] Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Starbucks v. European Commission*, ECLI:EU:T:2019:669, paras 167-169.

[664] Haslehner (n. 107).

[665] S. Daly, 'Trust, Tax Administration and State Aid', presented at the Indiana/Leeds Summer Zoom Tax Workshop Series, on May 28, 2020. See also E. Traversa, 'Editorial: Ongoing Tax Reforms at the EU Level: Why Trust Matters', (2019) 47(3) Intertax 244, 244; J. Freedman, 'Restoring Trust in the 'Fairness' of Corporate Taxation: Increased Transparency and the Need for Institutional Reform' in S. Goslinga, L. Van Der Hel Dijk, P. Mascini and A. Van Steenbergen, *Tax and Trust Institutions, Interactions and Instruments* (Eleven International Publishing, 2018), 124.

[666] Galendi (n. 514).

[667] Joint Cases C-78/09–C-80/08 *Paint Graphos* ECLI:EU:C:2011:550 (), para. 50; Joined Cases C-182/03 & C-217/03, *Belgium and Forum 187 ASBL v. Commission*, ECLI:EU: C:2006:416, para. 96.

[668] L. De Broe, 'The State Aid Review Against Aggressive Tax Planning: Always Look a Gift Horse in the Mouth', (2015) 24(6) EC Tax Rev. 291.

[669] S. Buriak and I. Lazarov, 'Between State Aid and the Fundamental Freedoms: The Arm's Length Principle and EU Law', (2019) 56 Common Market Law Review 1-46,; See similarly A.G. Saugmandsgaard Øe in his Opinion in Case C-374/17, *A-Brauerei*, EU:C:2018:741, para 77.

implementation, and it cannot and create a transfer-pricing regime in a country where such a regime does not already exist. Therefore, TP regimes, as others tax regimes, require that each country implements at domestic level a detailed formulation. [670]

Effectively, pursuant to previous CJEU case law, the arm's length principle was not considered an EU binding standard. For example, in the *Lankhorst-Hohorst* case, the CJEU has not accepted member state's arguments consisting of justifying a violation of fundamental freedoms based on compliance with the arm's length standard.[671] In another example such as the *Thin Cap GLO* case, the CJEU even accepted non-arm's length transactions.[672] In summary, the above-mentioned case law and literature do not support the existence of an EU arm's length binding principle.

If the existence of an EU arm's length principle has generated legal uncertainty, its content is even vague. In the EC earlier investigations, the content of the EU arm's length principle was partially established with the introduction of the concept of the "*prudent hypothetical market operator*", also known as the "*market economy investor principle (MEO)*".[673] The essence of this concept is that "*when a public authority invests in an enterprise on terms and conditions which would be acceptable to a private investor operating under normal market economy conditions, the investment is not a State aid*".[674] Similarly to the arm's length principle used in TP, the MEO test (or the "*prudent market operator test*") relies on the conditions of private operators acting under "*normal market conditions*",[675] which are defined as "*the conditions applying to the economy of member state where it does not intervene in favour of certain undertakings*".[676] However, the application of the MEO approach in the context of State aid law, especially in tax law, has faced criticism.[677]

The EC early reference on the MEO test could be attributed to strategic reasons rather than purely legal ones. Firstly, the resemblance between the OECD arm's length principle and the

[670] UN Practical Manual on Transfer Pricing for developing countries, (n. 123), B.1.7.1., B.1.7.2.,48.
[671] Case C-324/00, *Lankhorst-Hohorst GmbH and Finanzamt Steinfurt*, ECLI:EU:C.2020:749, paras 39-42.
[672] Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, ECLI:Eu:C:2007:161, para 87.
[673] The term Market Investor principle is used as a comprehensive concept of other sub-terms, such as "*prudent independent operator*", "*private operator*" or "*hypothetical market operator*": See the EC' use of the different terms in the Amazon decision, para 53; the Apple decision, paras 9, 53 and 54; the Starbucks decision, paras 11, 74 and 75; the Fiat decision, paras 13, 60 and 74. The MEO test was used in the Case C-234/84, *Kingdom of Belgium v. Commission of the European Communities*, ECLI:EU:C. 1986:302, para 14. See also J. Kavanagh and N. Robins, 'Corporate Tax Arrangements under EU State Aid Scrutiny', (2015) Eur. St. Aid L.Q. 358; A. Gunn and J. Luts, 'Tax Rulings, APAs and State Aid: Legal Issue's, (2015) EC Tax Review 119,123.
[674] B. Slocock, 'The Market Economy Investor Principle', (2002) Competition Policy Newsletter, 23.
[675] See Case C-39/94, *Syndicat francais del'Express international and others v. La Poste and others*, ECLI:EU:C.1996:285, para 60.
[676] Case C-131/15 P, *Club Hotel Loutraki AE and Others v. European Commission*, ECLI:EU:C.2016989, para 72.
[677] The CJEU distinguishes between two categories of situation: those where the intervention of the State is of an economic nature and those where it forms part of the exercise of public powers. See C-280/00, *Altmark Trans and Regierungrusprasidium Magdeburg*, ECLI:EU:C.2002:188, Opinion para 20. See also Joined Cases T-228/99 and T-233/99, *Westdeutsch Landesbank Girozentrale v. European Commission*, ECLI:EU:T:2003:57, para 272. In the *EDF* case, the Court applied already the MEO test to fiscal measure and the test was relevant for state aid control of a tax relief: See Case C-124/10 P, *Commission v. Electricité de France (EDF*), ECLI:EU:2012.318, para 92.

MEO principle since both of them rely on market forces as a benchmark.[678] Moreover, contrary to the arm's length principle that was not part of the previous Notice or other guidance, the MEO test has been already applied in the State aid law framework.[679] However, in the last investigations and the last guidance, the EC dropped the MEO argument by substituting the "*hypothetical market operator*" to reach "*market-based outcomes*".[680]

Currently, it remains uncertain whether the EU arm's length principle should be interpreted consistently with the interpretation of the MEO principle. Kavanagh and Robins argue that since both of them search for "*market-based outcomes*" there may be an implication to interpret the arm length similarly with the MEO principle.[681] Anestis and Mavroghenis argue that the MEO test is actually an arm's length test since both rely on the effects of market forces.[682] Honoré has highlighted that the "*new hybrid*" MEO test applied between private companies, whereas normally applies to evaluate public authorities' conducts.[683] Montenego argues that the MEO test cannot be applied in tax law since it has different logic and its application was related to the advantage rather than selectivity.[684] Haslehner also argued that the MEO test cannot be applied within tax law framework.[685] Jaeger has similar view.[686] Schön argues that both the arm's length and the MEO test cannot oblige a member state to include in its domestic tax law a given allocation method.[687] Vos distinguishes the potential existence of the EU arm's length principle and its interpretation by supporting arguments that criticised both the existence and the EC' interpretation.[688]

As argued in the previous Chapter, the GC decisions do not bring certainty, but they are valid jurisprudence until the CJEU issues judgments.[689] In the *Apple* case, although the GC does not mention the MEO test, its judgment confirms the EC's use of the arm's length standard "*as a*

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[678] *OECD TP Guidelines 2022*, para. 1.38: "*Independent enterprises, when evaluating the terms of a potential transaction, will compare the transaction to the other options realistically available to them, and they will only enter into the transaction if they see no alternative that is clearly more attractive. For example, one enterprise is unlikely to accept a price offered for its product by an independent enterprise if it knows that other potential customers are willing to pay more under similar conditions*".

[679] The 2014 draft does not refer to an EU Law based arm's length principle. Nor does it mention the criterion which seems decisive for assessing tax rulings in the 2016 version: a "reliable approximation of a market-based outcome". In the "2016 Notice", the arm's length principle "*necessarily forms part of the Commission's assessment of a tax measure granted to group companies under Art. 107 (1) of the Treaty […]*". See EC 2016 Notice (n. 24), para 172.

[680] In the 2014 draft notice on the notion of State aid, the EC made clear that the MEO test might apply to tax measures, as it stated that "the applicability of the [MEO test] cannot be ruled out simply because the means employed by the State are fiscal".: See European Commission, Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014), para 23.

[681] JKavanagh and Robins (n. 653), 366.

[682] P. Anestis and S. Mavroghenis, 'The Market Investor Test' in M. Sanchez Rydelski (ed), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*, (Cameron May, 2006), 112.

[683] M. Honoré, 'State Aid and Taxation, All Clear?', (2015), 24 European State Aid Law Quarterly 306.

[684] Monsenego (n. 67)30.

[685] Haslehner (n. 107)442.

[686] T. Jaeger, 'From Santander to LuxLeaks, and Back', (2015), 24 European State Aid Law Quarterly 345, 348.

[687] W. Schön, State Aid in the Area of Taxation, in L. Hancher, T. Ottervanger and P. J. Slot (eds.), *EC State Aids*, (3rd ed., Thomson Sweet and Maxwell, 2006), 255-257.

[688] B. Vos, 'State Aid, Taxation & Transfer Pricing: Illegal Fiscal State Ais Granted to Starbucks?', (2018) 2 EC Tax Review 113.

[689] See :2.5.2.

tool" to verify whether the level of profit allocated to Apple's Irish branches corresponded to the level of profit that they would have obtained under market conditions.[690]More precisely, the arm's length standard cannot be considered a free-standing obligation on member states deriving directly from Art. 107 TFEU, nor it was formally incorporated into Irish tax law. The GC affirmed that for the application of the so-called "*arm's length principle*" it was sufficient that Irish tax law foresees the taxation of profits of a branch "*as if it were determined under market conditions*".[691] However, the EC did not have the power to independently determine "normal" taxation disregarding the national rules of taxation.[692] Moreover, the EC has been entitled to make use of the OECD TP guidelines to assess the arm's length of the investigated transactions.[693]

In the *Starbucks* case, the GC followed the EC's arguments that the arm's length principle necessarily formed an integral part of the examination under Art.(107) TFEU, which embeds a general principle of equal treatment in taxation.[694] More precisely, the GC specifies that the assessment in the light of the arm's length principle specific to the EU forms part of its analysis of the selective advantage.[695] Art. 107(1) TFEU "*allows the Commission to check whether that pricing corresponds to pricing under market conditions*".[696] In line with EC's view the GC consider valid the application of the EU arm's length principle "*[w]hen national tax law does not make a distinction between integrated undertakings and standalone undertakings for the purposes of their liability to corporate income tax, that tax law is intended to tax the profits arising from the economic activity of such integrated undertaking as though it had arisen from transactions carried out at market prices*".[697] Similarly to the other GC judgments, the GC in *Starbucks* describes the arm's length as a "useful tool", a "benchmark" and a "methodology" to check whether the taxable profit of an integrated undertaking pursuant to a tax measure corresponds to a reliable approximation of a taxable profit generated under market conditions.[698] As regards the EU arm's length principle's content, the GC confirms that the OECD TPG do not bind the EC, but are not deprived of relevance. In fact, they have a "*practical significance in the interpretation*" of issues relating to TP given that they are based on important work carried out by groups of renowned experts, and "*reflect the international consensus achieved with regard to transfer pricing*".[699]

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[690] Joined Cases T-778/16 & T-892/16, *Ireland v. Commission*, ECLI:EU:T:2020:338, para 225. As regards the Apple case, see CFE ECJ Task Force 'Opinion Statement ECJ-TF 3/2000 on the General Court Decisions of 15 July 2020 in *Ireland v. Commission* and *Apple v. Commission* (Joined Cases T-778/16 and T-892/16) on State Aid Granted under Tax Rulings Fixing the Attribution of Profits to Permanent Establishments in Ireland', February/March 2021, https://taxadviserseurope.org/wp-content/uploads/2020/12/CFE-ECJ-TF-3-2020_Apple_FINAL-1.pdf ; Parada (n. 519).

[691] Joined Cases T-778/16 & T-892/16, *Ireland v. Commission*, paras 221, 217, 211, and 224.

[692] Ibid, para 223.

[693] Ibid, paras 323-324.

[694] Ibid, paras. 139, 162 and 168.

[695] Ibid, para 137.

[696] Ibid, para 151.

[697] Ibid, para 149.

[698] Ibid, paras 151, 152, 154, 157,163, 169, 196 and 199.

[699] Ibid, paras 151,152,154,155,196.

In the GC *Fiat* case, although the GC highlights that there is no general principle of equal treatment in relation to tax inherent in Art.107(1) TFEU, it upheld the EC's approach in endorsing the arm's length principle as indirectly stemming from Art. 107 TFEU.[700] The GC - consistent to the EC - qualifies the ALP as a "*tool to check whether a taxable profit of an integrated undertaking […] corresponds to pricing under market conditions*".[701] Although it is not entirely clear, the GC in *Fiat* derives the content of the EU arm's length principle from the the OECD TP Guidelines, which have the function of filling up the ALP with material content.[702] The simple fact that the GC accepted the EC's argument that the OECD Guidelines are merely a "*reference document*" and "*appropriate guidance*" does not change the outcome that the Guidelines are influencing substantive conclusions of the analysis.[703] In the *Amazon* case, the GC confirms the approach and interpretation it took in *Fiat*, *Starbucks*, and *Apple*.[704] In Engie, the Court underlines that as "it is apparent from the Court's case-law that those two criteria may be examined together, as the '*third condition' laid down in Article 107(1) TFEU, relating to the existence of a selective advantage*".[705] The FIAT case has shed lights on this specific topic clarifying that the arm's length principle can be applied when a member state has incorporate it into its domestic law system.[706] However, the EC is still entitled to investigate arm length transaction when member states have incorporated that principle in their respective legal system.[707]

In conclusion, the existence and the content of an EU arm's length principle embedded in Art 107 (1) TFEU had been a source of legal uncertainty. The FIAT case has put an end to this debated point. However, the EC is still entitled to investigate member states when they have incorporated that principle in their domestic legal system when the parameters laid down by national law are manifestly inconsistent with the objective of non-discriminatory taxation of all resident companies.[708]

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[700] Joined Cases, T-755/15 and T-759/15, *Luxembourg v. Commission*, paras 161 (as regards the general principle of equal treatment), 143, 144 and 151. See also I. Lazarov andS. Buriak, 'Is Fiat's Tank Hald-Full or Halff Empty? The General Court's Decision in Luxembourg v. Commission (T-755/15)', (2020) 27(1) International Transfer Pricing Journal.; J. Monsenego, 'Some Observations on Starbucks, Fiat, and their Potential Impact on Future Amendments to the Arm's Length Principle', (2019) Kluwer International Tax Blog, http://kluwertaxblog.com/2019/09/28/some-observations-on-starbucks-fiat-and-their-potential-impact-on-future-amendments-to-the-arms-length-principle/

[701] Joined Cases, T-755/15 and T-759/15, *Luxembourg v. Commission*, paras 143 and144.

[702] Ibid, para 147.

[703] Ibid, para 167. See also R. Mason, 'Implications of the Rulings in Starbucks and Fiat for the Apple State Aid Case', (2019) Tax Notes Federal, Vol. 165, No.1, 93.

[704] Joined cases T-816/17 and T-318/18, *Luxembourg v. Commission*. See also R. Mason, 'State Aid Enforcement After Amazon', (2021) 102 Tax Notes International, 1171.

[705] Joined cases T- 516/18 and T-525/18 *Luxembourg v Commission* ECLI:EU: T:2021:25, para 241.

[706] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, paras 102-104.

[707] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, paras 122.

[708] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, paras 122.

3.3.5. The Overlaps between the Examination of Advantage and Selectivity: the advantage is the measurement of the selectivity.

Another source of uncertainty is whether, in the particular circumstances of tax ruling and State aids, the advantage and selectivity should be analysed conjointly. It must be recalled that advantage and selectivity are, in general, two distinct criteria of the doctrinal analysis to determine whether a measure can be qualified as a State aid incompatible with the internal market.[709] In practice, both criteria are strictly connected, and in several judgments the CJEU has analysed them together.[710] However, it is hardly conceivable that favouring a company or group of undertakings does not affect the competitive position of another company that is not being favored, at least from an economic perspective.[711] Therefore, the conjoint or distinct analysis of the two criteria are still a disputable argument.

In the current State aid investigation on tax rulings, Ireland argued that the EC erred in law by disregarding the well-established case law by which the criteria of selectivity and advantage should have been analysed separately.[712] The literature is divided on this point.[713]

Buriak and Lazarof support the idea of differentiation since the selectivity test could be performed only within the jurisdiction of the investigated member state, and, due to sovereignty limits, a member state can treat undertakings differently. On the contrary, whether such different treatment entails an economic tax advantage to an MNE cannot be successfully answered without looking at the overall international tax treatment.[714] They propose that an economic advantage must be examined at the level of the group rather than at the individual entity level. The basis of this argumentation is the fact that an advantage at an individual company level does not automatically confer an advantage to the whole undertaking. The EC rejected this kind of argument since "*an advantage at the level of one company received from a member state cannot be compensated with the disadvantage at the level of another company, even if those companies are parts of the same group*".[715] Also, in the *Dutch group interest box* Decision, the EC confirmed that

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[709] See: 3.2.3.1., 3.2.3.3.

[710] See, *inter alia*, Case C-270/15 P *Belgium v Commission*, , EU:C:2016:489, para. 32. Case C-143/99, *Adria-Wien Pipeline GmbH*, para 41, 42. See also, e.g. H. López (n. 35)807. P. Rossi Maccanico, 'The Notion of Indirect Selectivity in Fiscal Aids: A Reasoned Review of the Community Practice' (2009) European State Aid Law Quarterly, Vol. 8, No. 2, 161-176. The commentator seems justified in saying that the Court often deals with the criteria of advantage and selectivity cumulatively as fiscal derogations "having the effect" o favouring certain undertakings, as if they constituted one criterion.

[711] A. Hosson, 'Tax Facilities for State-Induced Costs Linder the State Aid Rules', in D. Weber (ed.) *The Influence of European Law on Direct Taxation Recent and Future Developments*, (Kluwer Law International, 2007), 189.

[712] GC Decision in *Apple*, para. 133.

[713] In favour of the separated analysis, see H. López, ibid 809; U.S. Department of the Treasury White Paper (n. 35), 6; Richard (n. 35); V. Hernández Guerrero (n. 497)91; Buriak and Lazarov (n. 649). Micheau (n. 67); Lang (n. 67)34; Monsenego (n. 67)11. For the opposite opinion, see Szudoczky (n. 35)580; Lyal (n. 35)1031; L. Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 Journal of European Competition Law & Practice 369, 376; Bobby (n. 567); Parada (n. 519).

[714] Buriak and Lazarov (n. 649).

[715] SA.38375, *Fiat*, para 314.

advantages from tax disparities between jurisdictions are not within the scope of State aid law to the extent that the national tax systems are themselves coherent.[716] This is in line with the pure essence of State aid law, which focuses on the tax system of a singular member state in isolation.[717] On the contrary, Parada argues that, in practice, both conditions are strictly connected by confirming the CJEU interpretation that nothing in law prevents that advantage and selectivity can be analysed together.[718] In this regard, their conjoint analysis does not affect the whole State aid analysis.[719] Richard Lyal also noted that there is a "*considerable overlap*" between the notions of advantage and selectivity.[720] De Pietro argues that "*presumption of selectivity*" implies that it is up to the member state to prove that the same advantage would have been granted to any other undertaking in the same legal and factual position.[721] Other authors have the same view.[722] From the abovementioned literature, even after several years from the beginning of the EC investigations, the possible conjoint analysis of advantage and selective can be considered as leading to legal uncertainty.

In order to better scrutinise the notions of advantage and selectivity in the State aid context, it might be useful to highlight two different scenarios: (i) when there is an advantage without selectivity and (ii) when there is selectivity without advantage. It should be recalled that in both scenarios there is no State aid.[723]

In the first scenario, a measure has the effect to grant an advantage without being selective. The potential results might be: (i) a "*general measure*"[724], (ii) a measure with narrow scope applicable to all liable taxpayers, (iii) a measure that is justified by the nature or general structure of the system of which the measure is a part. Firstly, in order to be considered as "*general*", a measure must not be aimed at one or more specific recipients defined in advance. Moreover, it must not be "*subject to a series of objective criteria according to which it may be granted,*

[716] Commission Decision (2009) 4511 final, *Dutch Group Interest Box*, OJ L 288/26 of 4 November 2009.
[717] R. Luja, 'State Aid Rules and Their Limits', (2014) Tax Notes Int'l 353.
[718] Case C-270/15 P, *Belgium* v *Commission*, EU:C:2016:489, paras. 31-32.
[719] In the same vein, see GC Decision in *Apple*, paras. 138-139.
[720] Lyal (n. 35)1031.
[721] C. Di Pietro, Symposium on State Aid, European Taxation, IBFD, April 2017.
[722] B. Stromsky, 'La Cour de justice de l'Union européenne confirme que constitue un avantage sélectif la prolongation, par le juge des référés, d'un contrat accordant à une entreprise un tarif préférentiel' (2020) 1 Concurrences 129, 129–130 ; L. Hancher, 'The Role of Presumptions and the Burden of Proof in Recent State Aid Cases—Some Reflections' (2019) 4 EStAL 470, 473. On the contrary see: N. Bayón Fernández, The Selective Advantage Criterion in Tax Tulings: The Path Towards a More Coherent and Through Analysis of Selectivity, Journal of European Competition Law & Practice, 2021, Vol.12, No.3.
[723] See, *inter alia*, Case C-142/87 *Belgium v Commission*, ECLI:EU:C:1990:125, para 25; Joined Cases C-278/92 to C-280/92 *Spain v Commission*, ECLI:EU:C:1994:325, para 20; Case C-482/99 *France v Commission*, ECLI:EU:C:2002:294, para 68.
[724]Joined Cases C-106/09 and C-107/09 P, *Government of Gibraltar*, ECLI:EU:C:2011:732, para 73; Case C-417/10, 3M Italia SpA, ECLI:EU:C:2012:184, para 39. However, the CJEU jurisprudence has clarified that even measures which, at first appearance, apply to undertakings in general may be selective to a certain extent and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. See also: Case C-256/97, *DM Transport*, ECLI:EU:C:1999:332, para 27; Joined Cases T-127/99, T-129/99 and T-148/99, *Territorio Histórico de Álava - Diputación Foral de Álava (T-127/99), Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA (T-129/99) and Daewoo Electronics Manufacturing España, SA (T-148/99) v Commission of the European Communities*, ECLI:EU:T:2002:59, para 149.

within the framework of a predetermined overall budget allocation, to an indefinite number of beneficiaries who are not initially individually identified"[725]. Nevertheless, the general measures that prima facie apply to all undertakings but are limited by the discretionary power of the public administration might be selective[726]. The selectivity makes a difference between a State aid and "*general measures*", which apply "*in an automatic manner across the board to all firms in all economic sectors in member state*"[727]. The threshold of convincing the EC that a measure is general is very high.[728] Despite the high threshold, a limit is present in the advantage assessment that has to be made with respect to the national system at stake and not by carrying out a comparative analysis with tax systems in other member states.[729] Therefore, a measure that satisfies all the abovementioned requirements gives and advantage to all the economic operators without being *de jure*[730]and *de facto*[731] selective.

Secondly, although a measure with a large number of beneficiaries in several sectors is not necessarily general, a measure with narrow scope can be general if applicable to all liable taxpayers. The Lübeck case[732] is a masterful example. The EC opened a formal investigation procedure on the reduction of landing charges in Lübeck Airport, which conferred an advantage only to airlines that used that airport, considered as in direct competition with Hamburg Airport (Germany)[733]. In accordance with para 43a(1) of the LuftVZO[734], the operator of an airport, exercising a power of its own, draws up the scale of the airport fees applicable to that airport. The Lübeck airport, starting from 2006, applied the reduction to all air companies operating in the airport. Although the Court used the blurred term of "*selective advantage*"[735], the ambiguity between the two criteria is present only in that term. The advantage

[725] Commission Notice (n. 24), para 118. See also Case T-379/09, *Italy v Commission*, ECLI:EU: T:2012:422, para 47. The measure in question in that case was a partial exemption from excise duty on the diesel used for the heating of greenhouses. The General Court indicated that the fact that the exemption could benefit all undertakings choosing greenhouse production was not sufficient to establish the general character of the measure.

[726] Commission Notice ibid, para123. This is the case where meeting the given criteria does not automatically result in an entitlement to the measure.

[727] See C. Golfinopoulos, 'Concept of Selectivity Criterion in State Aid Definition following the Adria-Wien Judgment', (2003) ECRL, Volume 24, 544.

[728]Joined Cases C-106/09 and C-107/09 P, *Government of Gibraltar*, ECLI:EU:C:2011:732, paras 95 and 101. The Gibraltar's corporate income tax reform is a paramount borderline example, in which the objective of reform was to introduce general tax system for all companies; it formally applies to all companies, including both onshore and offshore. Nevertheless, the bases for the assessment have been deliberately designed so as to automatically exclude offshore companies from taxation (para 106). The measure is discriminatory by design and therefore selective (para 107).

[729] M. Sánchez Rydelscki, *Distinction between State Aid and General Tax Measure*, (Kluwer Law International, 2010).

[730]*De jure* selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only. See Commission Notice (n. 24), para 121.

[731]*De facto* selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings. See Commission Notice (n. 24), paras 121-122.

[732] Case C-524/14, *Commission v Hansestadt Lübeck*, ECLI:EU:C:2016:971, 21 December 2016. See also the reduction of Danish tax on surplus heating: State aid case No N. 271/2006 – Denmark, Brussels,20.12.2006, K(2006) 6591 final cor..

[733] Supra para 36.

[734] Paragraph 43a(1) of the Luftverkehrs - Zulassungs-Ordnung (Air Traffic Licensing Rules) of 19 June 1964 (BGBl. I, p.370), in the version in force in 2006 ("the LuftVZO"), FL adopted the 2006 schedule.

[735] Ibid para 40.

is the difference between the treatment before and after the provision in force since 2006. Therefore, the advantage is present. Only selectivity was the assessment under consideration. Actually, the Court held that the EC had wrongly found that the schedule was selective[736]and any advantages conferred by the 2006 schedule is not sufficient to establish that the particular schedule is selective.[737] The comparability must not be assessed vis-à-vis other competitors, such as Hamburg airport, but has to be assessed among undertakings, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation.[738] The statement that airlines serving other airports are not comparable means that the second step of the selectivity analysis is not fulfilled, hence it was not necessary to proceed with the justification test. Under this system that gives autonomy to each airport, other airlines serving other airports are not comparable and the eventual comparison with competitors was held to be an incorrect approach.[739] What becomes evident is that in this case the advantage criterion is fulfilled but not the selectivity one.

Thirdly, an advantage without selectivity is present also when a measure is justified by the nature or general structure of the system of which the measure is a part.[740] The *A-Brauerei* Case[741] is a masterful example. The measure at stake is an exemption from tax on transfer of real property in case of restructuring between undertakings linked by a shareholding greater than or equal to 95%. The tax advantage, at issue in the main proceedings, consists in the exemption from real property transfer tax. After having clarified that the advantage criterion is fulfilled, there must be an examination of the selectivity that may occur. This is due to the fact that the restructuring procedure involves solely companies of the same group. The reference framework is the tax on transfer of real property.[742] Under the comparability analysis, all undertakings transferring property are in a comparable situation in light of fiscal objective of tax provision.[743] In this case, the discrimination is present because a group of undertakings engaging in restructuring are favoured over other companies carrying out the same procedure.[744] Although the previous requirements are all met, the justification qualified the advantage as not selective. The objective justification is to avoid double taxation,[745] therefore,

[736] Ibid para 64.
[737] Ibid para 59.
[738] Ibid para 55.
[739] Ibid para 63.
[740]Commission Notice (n. 24), paras 39-41.
[741] Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:1024, 19 December 2018. The request for a preliminary ruling has been made in proceedings between Finanzamt B (tax office of B, Germany) and A-Brauerei concerning the Finanzamt's refusal to grant A-Brauerei the exemption from the real property transfer tax which may under certain conditions be available, under German tax law, to companies acquiring a right of ownership to property in the context of restructuring procedures within certain groups of companies.
[742] LuftVZO (n. 709), para 37.
[743] Ibid paras 38-41.
[744] Ibid, paras 42-43.
[745] Ibid., paras 44-52.

despite the advantage granted, the selectivity criterion is not fulfilled and Art. 107 (1) TFEU does not apply.[746]

In the previous three circumstances of the first scenario analysed above, the advantage is granted although it is not selective for several reasons. This latter scenario is the most common. In the second scenario, some circumstances will be scrutinised, where the advantage is not present, although the selectivity is fulfilled.

Firstly, the existence of an advantage is excluded in the case of a reimbursement of illegally levied taxes,[747] due to the fact that, in this circumstance, the benefit has the function of re-establishing the previous disadvantaged position rather than providing an advantage relief of costs. In this latter case, the re-establishing of charges "normally included" means restoring the situation, which has prevailed if the operation in question had been carried out without the extra tax levied, namely restoring the *status quo ante*. [748]

Secondly, in some special cases, it seems that the advantage is not present although the measure is apparently selective. In the Case C-5/14 *Kernkraftwerke Lippe-Ems,*[749] the Court rejected the application, which argued that a high asymmetric burden on a specific source of energy does not comply with the State Aid provisions. The claimants took the view that such an asymmetric high burden on a specific source of energy is not in line with Art. 107 para. 1 TFEU. The national legislation, levying a duty on the use of nuclear fuel used for the commercial production of electricity, disfavored the nuclear undertaking in comparison with other electricity producers. Schön defines this unfavorable treatment as "negative State aid",[750] which is a situation where the tax legislator levies a specific high tax burden on certain enterprises or industries. Other authors highlight that State aid provisions do not prohibit negative deviations from the tax system reference.[751] In spite of the apparent absence of advantage, in this case the fundamental assessment is the appraisal of the selective condition.[752] The applicant takes a wrong approach comparing the different treatments among competitors. It is evident that electricity has the particular characteristic that it can be produced using several very different techniques,[753] and it also evident that the final customers buy electricity, therefore the nuclear producer of electricity are in competition with other producers. Even

[746]Quigley (n. 37); C Romaritz 'Revisiting Material Selectivity in EU State Aid Law – or "The Ghost of Yet-To-Come", (2014), EU State Aid Law Q 13(1):39-50.
[746] Commission, Notion on State Aid, para100-103.
[747] Case C-61/79, *Amministrazione delle finanze dello Stato* [1980] ECLI:EU:C:1980:100, paras 29 to 32.
[748] Case C-126/01 *Ministre de l'Economie, des Finances et de l'Industrie v GEMO SA* [2003] ECR I-13769, paras 28-9.
[749] Case C-5/14, *Kernkraftwerke Lippe-Ems*, ECLI:EU:C:2015:354, 5 June 2015. The case regards a request for a preliminary ruling from the Finanzgericht Hamburg, in order to request an assessment whether a national provision breach EU State aid law.
[750]Schön (n. 36). It should be made clear that also in the author's opinion this case is not the perfect example to define the negative state aid "due to the fact that the nuclear fuel tax was closely knit".
[751]See, *inter alia*, R. Ismer and S. Piotrowsky, 'The Selectivity of Tax Measures: A Tale of Two Consistencies', (2015) Intertax 43(10), 564.
[752] LuftVZO (n. 709), para 74.
[753]AG opinion, Case C-5/14, Kernkraftwerke Lippe-Ems, ECLI:EU:C:2015:51, para 70.

though undertakings using these different methods are in competition with each other to a certain extent, (as they all produce electricity) they are not in the same factual and legal situation[754], hence they are not comparable. In the light of the objective pursued by those rules, they are not in a factual and legal situation. Namely, the legal situation is not comparable to that of the production method based on nuclear fuel, as only that method generates radioactive waste arising from the use of such fuel.[755] It follows that KernbrStG is not a selective measure, [756] for the purpose of Article 107(1) TFEU, and it does not therefore constitute State aid prohibited by that provision.[757]

From the abovementioned case, it appears that selectivity is different from the advantage assessment. Effectively, the advantage and selectivity are indeed two separate conditions of the State aid analysis, and they have a substantially different meaning. The advantage refers to the fact that the financial position of the undertaking has improved due to the aid.[758] The selectivity aims to demonstrate that such undertaking enjoys a privileged position in comparison to other undertakings in a similar legal and factual situation, in light of the objective of the reference system.[759] In other words, the advantage is the measurement of the selectivity.

However, the conflation of the advantage of the selectivity does not concern the conflation of their meaning (which are different) but the conflation of their assessment. Their conjoint analysis is not a novelty neither in the State aid literature[760] nor in the CJEU jurisprudence since the judgment in *Adria-Wien Pipeline*.[761] Both tests aim at finding a tax aid, a reference treatment, and both need necessity to identify a benchmark. Quigley qualified this hybrid notion as an "*economic advantage*", "*selective advantage*" and "*competitive advantage*".[762] There are some cases in which it is showed that independent examination cannot be consistently applied in a given situation,[763] and others that need a separate analysis, and other a hybrid one, such as the Gibraltar case[764]and the *Presidente del Consiglio dei Ministri v. Regione Sardegna*[765] cases. Therefore, a merged analysis shall be carried out on a case-by-case basis.

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[754] LuftVZO (n. 709), para 75.
[755]Ibid, para 79.
[756]A German law that provides a levy on nuclear fuel for which KLE is liable under the Kernbrennstoffsteuergesetz (law on excise duty on nuclear fuel) of 8 December 2010 (BGB1. 2010 I, p. 1804) ("KernbrStG").
[757] LuftVZO (n. 709), para 80.
[758] See, *inter alia*, Case C-173/73, Italy v Commission, EU:C:1974:71, para. 15.
[759] See, *inter alia,* Joined Cases C-78/08-C-80/08, *Paint Graphos and Others*, EU:C:2011:550, para. 49.
[760]Schön (n. 36). H. López (n. 35)).
[761] Case C-143/99,*Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, ECLI:EU:C:2001:598; Case C-270/15 P *Belgium* v *Commission*, , EU:C:2016:489, para. 32.
[762]Quigley n. 37).
[763] Lang (n. 67).
[764] Joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v. Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732.
[765] Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, ECLI:EU:C:2009:709

In the EC's view, the current circumstances of the tax ruling cases seem prone to favour a conjoint analysis. Moreover, the EC approach found also legal support on the CJEU jurisprudence, particularly on the *MOL* case.[766] Notably, the EC argues that the tax rulings involved in the recent cases are individual measures and, therefore, based on the interpretation of the CJEU's decision in *MOL*, there is a "*presumption of selectivity*".[767] Since individual measures are selective, it is sufficient that an advantage has been granted in order to qualify a measure as State aid. In the CJEU words, in the case of individual measures, "*the identification of the economic advantage is in principle, sufficient to support the presumption that it is selective*".[768] By applying for an APA, the counterpart does not have the burden to demonstrate the selectivity, which, among all State aid law criteria, is the most difficult to demonstrate.[769]

Part of the legal literature agrees on the conjoint analysis in the case of individual measures, such as tax rulings. Loewenthal submitted that selectivity should be presumed when it can be established that an advantage was conferred on an individual undertaking.[770] Bobby affirms that "*it is not logical to analyse whether selectivity is present in an advantage aimed at only a single taxpayer*".[771] Rossi-Maccanico has the similar view, since he argues that when reviewing individual ruling, the selectivity assessment becomes superfluous.[772]

In the *Apple* case, the GC has accepted the EC's methodological approach of joining the assessment of the advantage and selectivity.[773] In Engie, the GC stated that the EC was entitled to assess the condition of an advantage and the condition of selectivity simultaneously – the so-called "selective advantage".[774]

In conclusion, the advantage and selectivity are two distinct criteria with a different meaning. However, in particular circumstances, and especially in the case of individual measure, such as tax rulings, their methodology overlaps since both of them are based on a benchmark against the normal reference system. The advantage refers to the financial position of the undertaking has improved due to the aid,[775] and the selectivity refers to the fact that such undertaking has

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766 Case C-15/14 P *Commission v MOL*, EU:C:2015:362, para. 60.
767 Ibid, para. 60; See also CaseC-211/15 P *Orange v Commission*, EU:C:2016:798, para. 54.
768 Case C-15/14 P, *Commission v. MOL*, EU:C:2015:362, para 60.
769 Offermanns argues that the presumption on selectivity implies that it is up to the Member State to prove that the same advantage would have been granted to any other undertaking in the same legal and factual position. See R.H.M.J. Offermanns, 'European Union/Netherlands - Symposium on State Aid', (2017), European Taxation, Volume 57, No 4.
770 M. Vekeman, 'State Aid and (In) Direct Taxation: Report on the 12th Frans Vanistendael Lectures', (2019) 28(4) EC Tax Review, 217
771 Bobby (n. 567).
772 P. Rossi-Maccanico. (n. 635)
773 Joined Cases T-778/16 & T-892/16, *Ireland v. Commission,* paras. 135, 138 (« *irrelevant* »). See also CFE ECJ Task Force, 'Opinion Statement ECJ-TF 3/2020 on the General Court Decisions of 15 July 2020 in *Ireland v. Commission* and *Apple v. Commission* (Joined Cases T-778/16 and T-892/16) on State Aid Granted under Tax Rulings Fixing the Attribution of Profits to Permanent Establishments in Ireland', (2021).
774 Cases T-516/18 and T-525/18, Luxembourg v. Commission and Engie v. Commission, Para 241. See also L. De Broe, M. Massant, The General Court's Judgment in Engie: The Non-application of a National GAAR Confers State Aid, EC Tax Review, 2022-1.
775 Case C-173/73, *Italy* v *Commission*, EU:C:1974:71, para. 15.

enjoyed a favourable position in comparison to other undertakings in a similar legal and factual situation, in light of the objective of the reference framework.[776] The EC do not order the recovery of the selectivity, but the recovery of the advantage, which the difference in treatment between undertakings in similar legal and in factual situation; therefore the advantage is a measurement of the selectivity.

In this regard, since both of them are measured against the same reference framework, the methodology to test the advantage overlaps with the methodology to assess the selectivity. From a purely formal perspective, the justification stage represents the main difference between advantage and selectivity.[777] Even with this argument, there is still uncertainty. For example, Lopez argued that the justification regards only the advantage rather than the selectivity.[778]In the end, this particular uncertainty boils down to the previous related confusion, namely if the underlying general principle justifies the advantage rather than the selectivity. The ability to pay principle may be a basis to justify a different treatment based on the ability. It is difficult to support the idea that the ability to pay principle justifies the advantage derived by the difference treatment by excluding the inevitable consideration of the selectivity.

What can be deducted from all these different views about the unified approach of the selective advantage is the legal certainty remains, at least until the CJEU judgments. This sort of uncertainty is exacerbated by the fact that the concepts of advantage and selectivity are blurred itself, particularly in the context of TP and tax rulings. The *World Duty Free* Case has clarified that it is not necessary to identify a particular category of undertakings for a fiscal measure to be selective.[779] On the contrary, the application of the arm's length "*forces*" all stakeholders to identify a group of undertakings with specific characteristics (comparables). Moreover, under EU State aid law, the advantage is an objective concept.[780] On the contrary, the arm's length is not an objective concept,[781] therefore defining the advantage objectively via the arm's length is an oxymoron, since there will be a juxtaposition of opposing meanings.

[776] Case C-78/08 to C 80/08*Paint Graphos and Others*, EU:C:2011:550, para. 49.
[777] As regards the justification stage Cf: 3.2.3.3.
[778] Lopez Lopez (n. 35), 809.
[779] Joined Cases C-20/15P and C-21/15 *Commission v World Duty Free Group* (formerly Autogrill España), Banco Santander & Santusa Holding, EU:C:2016:981. As regards the confusion between selectivity and advantage in World Duty Free, see J. Derenne, 'Commission v World Duty Free Group a.o.: Selectivity in (Fiscal) State Aid, quo vadis Curia?', (2017) Journal of European Competition Law & Practice, Vol.8, No.5, 311.
[780] Cf: 3.2.3.1.
[781] OECD Transfer Pricing Guidelines 2022, A.7.1: "*because transfer pricing is not an exact science, there will also be many occasions when the application of the most appropriate method or methods produces a range of figures all of which are relatively equally reliable*".

3.3.6. The Comparability between MNEs and a Stand-Alone Company

One of the main uncertainties of the current fiscal State aid investigation on tax rulings is whether MNEs could be compared with stand-alone companies. The identification of the correct comparable undertakings is a key element for both TP and selectivity analysis.[782] Determining which companies should be compared is the basis of the assessment of eventual differentiation.

The EC comparability between associated and stand-alone enterprises is one of the main arguments of the EC.[783] In its view, independent companies and groups of companies are in a similar factual and legal situation in light of the intrinsic objective of any corporate tax system, namely to tax the profits of all resident companies.[784] The EC has also supported the idea that the comparability between groups and independent companies is precisely the objective of TP rules and possible deviations need to be corrected.[785] The EC builds its reference base argument on an identity of purpose in states' assessment of corporate taxes for MNEs and stand-alone domestic companies. To put it differently the EC interprets the purpose of the corporate tax in both contexts: to basically tax the "*profit of all companies subject to tax in the relevant member state*."[786]

The TP Guidelines note the factual difference between integrated companies and non-integrated, particularly: "*a practical difficulty in applying the arm's length principle is that associated enterprises may engage in transactions that independent enterprises would not undertake. Such transactions may not necessarily be motivated by tax avoidance but may occur because in transacting business with each other, members of a [MNE] group face different commercial circumstances than would independent companies*".[787]

This factual difference has been highlighted by part of the legal literature, which is contrary to the EC's approach. Richard argues that the reference system for evaluating a tax ruling provided to a MNE must be the tax laws, which apply to multinational enterprises in the member state.[788] Schön argues that the internal dynamics and pricing in an integrated

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[782] Cf : 3.2.3.3.

[783] *Starbucks* Decision, paras 235–244; *Fiat* Decision, paras 197–209; *Belgian Excess Profit Exemption* Decision, para.138; *Apple* Decision, paras 228–230; *Amazon* Decision, para. 403.

[784] *Starbucks* Decision, para. 244; *Fiat* Decision, para. 209; *Belgian Excess Profit Exemption* Decision, paras. 136 and 148; *Apple* Decision, para. 229; *Amazon* Decision, para. 589

[785] *Apple* Decision, para. 235. The use of both tax systems' objective and the concrete tax regime's objective to establish comparability lack of consistency. See Haslehner (n. 107)440. See also Szudoczky, who argued that the objective of the general *system* is used to establish comparability at the first step of the selectivity analysis, whereas the concrete *measure's* objective ought to 'play a role' at the third step, in order to establish whether an objective justification for a prima facie selective measure exists: R. Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms', (2016) 15(3) EStAL 357, 363.

[786] *Apple* Decision final, para. 228; *Starbucks* Decision, paras. 244-249.

[787] OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, 34-35.

[788] K. Richard (n. 35).

undertaking are very different from those in a stand-alone entity.[789] Nicolaides argues that related entities face different commercial circumstances, which independent companies do not face, therefore they are not comparable.[790] Luja argues that the integration itself supports the argument the MNEs and independent companies are not comparable.[791] Bonnici and other authors put forward a similar argument.[792] Buriak and Lazarov argues that specific economic features of integrated undertakings make them incomparable to stand-alone companies, and both stand-alone and integrated undertakings might transact under non-market conditions.[793] Baker argues that MNEs and stand-alone enterprise are not comparable: since, first, there is no question of adjusting the profits arising to a stand-alone enterprise in tis dealing with associated enterprises, and one cannot compare the application of TP rules of a stand-alone enterprise, which is never subject to such legislation. Secondly, some aspects of the commercial transactions of members of an MNE that simply do not apply to a stand-alone enterprise, such as economy of scale, purchasing power, and other benefits of synergy.[794]

Other academics make distinctions when member states have implemented the arm's length standard in their domestic rules, of which the comparability between groups and independent companies is precisely the objective of TP rules and possible deviations need to be corrected.[795] Monsenego argues that, when the comparison is made in the light of the objective of a corporate income tax, MNEs and stand-alone companies are in a comparable situation.[796] It is precisely the objective of the tax system that make all of them comparable. *Ad absurdum*, reaching the opposite conclusion (i.e. they are not comparables) would lead to consequences that are at odds with the logic of the rules on State aid: "*if [MNEs], domestic groups, and independent enterprises were generally deemed not be in a comparable situation, the member states would have the right, under State aid rules, to tax these three categories of undertaking differently, despite the potential breaches in the competitive conditions that this may imply for various undertakings*".[797]Haslehner argues that MNEs and independent enterprises are comparable due to the fiction created by the arm's length

[789] Schön (n. 107)94-96.
[790] Nicolaides (n. 519).
[791] R. Luja, 'State Aid Benchmarking and Tax Rulings: Can We Keep it Simple?' in I. Richelle et al. (eds), *State Aid Law and Business Taxation*, (Springer, 2016)114.
[792] Bonnici (n. 54). I. Palieri, 'What Constitutes State Aid? Important Factors Companies Should Consider', (15 March 2019), Journals Tax Analysts, https://www.taxnotes.com/special-reports/international-taxation/what-constitutes-state-aid-important-factors-companies-should-consider/2019/03/15/2967c
[793] Buriak and Lazarov (n. 649).
[794] P. Baker, 'The Week of the 10 May 2021: A week of State Aid, Transfer Pricing, and Tax Rulings', (2021) Intertax, Vol. 49, Issue 8/9,, 602.
[795] P. Nicolaides, 'State Aid and Tax Rulings' (2016) European State Aid Law Quarterly 416, 426, states: *"[…] if the comparison is between the amount of tax that is paid without the tax ruling and the amount of tax that is paid with the tax ruling, then group companies do not receive a selective advantage, but a selective disadvantage. They pay more than what they would have paid without the tax rulings*".
[796] Monsenego (n. 67)102.
[797] Ibid.

principle, otherwise they are not legally and factually comparable.[798] The Fiat case has supported this view.[799]

Previously, some words of the CJEU stated in the Forum 187 case, appeared affirming this kind of comparability.[800] The EC has based most of its arguments in that judgment.[801] Moreover, the *Gibraltar* case has put the basis to support that integrated and not integrated companies fall under the same reference system.[802] However, the Fiat case has clarified that only when member states incorporate the arm's length principle in their domestic law system then integrated and not integrated can be comparable.

The majority of the tax ruling cases are pending before the CJEU. The GC Court has endorsed the EC's position in its judgments in the *Starbucks*, and GC *Fiat* cases.[803] On the question of comparability, it concluded that the fact that the national tax systems aimed at taxing each corporation separately necessarily implied the application of the arm's length principle.[804] In the *Starbucks* case, the GC specifies that Art. 107 (1) TFEU amounts to a "*general principle of equal treatment of the profits of stand-alone companies and integrated companies*".[805]

In conclusion, whether the members of MNEs are comparable to stand-alone entities in light of the State aid compliance was a great a source of uncertainty. This point has been debated in the legal literature, and the GC upheld the EC's position supporting their comparability. The FIAT judgment has clarified the conditions on which integrated and non-integrated companies can be comparable.

3.3.7. Partial Conclusion

The EC's investigations on tax rulings have inevitably highlighted that EU taxpayers are deprived of available domestic and European legal remedies able to provide *ex-ante* legal certainty and eliminate or at least reduce State aid disputes. The *ex-ante* inability to provide

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[798] Haslehner (n. 107)438.

[799] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, paras 122.

[800] CJEU C-182/03 and C-217/03, *Belgium and Forum 187 v. Commission*, ECLI:EU:C:2003:385, para 95. Cf: 3.3.4.

[801] See *Starbucks* Decision, para. 259; *Fiat* Decision, para. 223; *Belgian Excess Profit Exemption Decision*, para. 146; *Apple* Decision, para. 250; *Amazon* Decision, para. 402.

[802] Haslehner (n. 107)438.

[803] Joined Cases T-760/15 and T-636/16, Kingdom of the Netherlands and Starbucks vs. European Commission, ECLI:EU:T:2019:669; Joined Cases T-755/15 and T-759/15, *Luxembourg v. Commission*. ECLI:EU:T:2019:670

[804] T-636/16, *Starbucks Corp and Starbucks Manufacturing Emea BV v Commission*, para. 149 and T-755/15, *Luxemburg and Fiat v Commission*, ECLI:EU:T:2019:670, para. 141: "*Where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices*".

[805] Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Starbucks v. European Commission*, ECLI:EU:T:2019:669, paras 167-169.

certainty is an inherent characteristic of the arm's length principle, irrespective of whether the arm's length should be qualified as a tool, principle, or standard.

Beyond this inability to provide early certainty, the tax rulings come with some legal uncertainty that will remain so until the CJEU judgments. The existence of an EU arm's length principle embedded in Art 107 (1) TFEU was a legal uncertainty until the *FIAT* case. Another legal uncertainty was the content of this *sui generis* arm's length principle. The tax rulings also come with additional legal uncertainties, such as the content of the EU arm's length principle, which is not formalized but appears to coincide with or be influenced by the OECD Transfer Pricing Guidelines. There is also uncertainty surrounding the validity of the joint analysis of advantage and selectivity, as these concepts are unclear, especially in the context of TP and tax rulings. The World Duty Free case clarified that a fiscal measure can be selective without identifying a particular category of undertakings,[806] as the application of the arm's length principle requires the identification of comparable entities with specific characteristics. Moreover, under EU State aid law, the advantage is an objective concept.[807] However, this creates a contradiction as advantage is an objective concept under EU state aid law, while the arm's length is not.[808]Additionally, there is ongoing debate regarding the comparability between entities within a multinational enterprise (MNE) and standalone entities.

The EC's investigations have weakened the perception of the legal certainty provided by tax rulings and have resulted in ongoing legal debate, some of which has been clarified by the Court of Justice of the European Union (CJEU) in the FIAT case, while others will remain uncertain until future CJEU judgments.

3.4. The *ex-post* Protection from Recovery based on the Legal Certainty Principle

3.4.1. Introduction

The legality and legitimacy of the European Commission's (EC) approach to fiscal State aid and tax rulings has been widely discussed by scholars,[809] but only a few have addressed the

[806] Joined Cases C-20/15P and C-21/15 *Commission v World Duty Free Group* (formerly Autogrill España), Banco Santander & Santusa Holding, EU:C:2016:981. As regards the confusion between selectivity and advantage in the World Duty Free case, see: Derenne (n. 753).
[807] Cf: 3.2.3.1.
[808] OECD Transfer Pricing Guidelines 2022 (n. 11): "*because transfer pricing is not an exact science, there will also be many occasions when the application of the most appropriate method or methods produces a range of figures all of which are relatively equally reliable*", A.7.1.
[809] Quigley (n. 37)107; P. Rossi-Maccanico, 'Fiscal State Aids, Tax Base Erosion and Profit Shifting' (2015) 2 EC Tax Review 63; Gunn and Luts (n. 653); R. Luja, 'Will the EU's State Aid Regime Survive BEPS?' (2015) 3 British Tax Review 379; M. Lang, 'Tax Rulings and State Aid Law' (2015) 3 British Tax Review 391; Schön (n. 36); Lyal (n. 35); W. Haslehner and A. Ancora, 'The Apple State Aid Case' in M. Lang et.al (eds.,) *CJEU Recent Development in Direct Taxation* (Linde Verlag,

validity of the EC's decisions to recover State aid in negative decisions.[810] Regarding the validity of the EC's decision to order recovery, legal certainty plays a fundamental role. Pursuant to State aid law regulation and CJEU jurisprudence, the legal certainty principle protects taxpayers from the EC's recovery orders, when the State aid law's legal effect is considered unforeseeable.[811] In this case, legal certainty can be achieved on an *ex-post* basis because it acts as a guiding principle when judges are required to evaluate (*ex-post*) whether the level of legal uncertainty goes beyond the acceptable level to the extent that taxpayers cannot foresee the legal consequences of their actions. In the recent EC investigations on dispute avoidance mechanisms, the legal certainty protection has been pleaded by most of the investigated MNEs. However, both GC and EC have denied the member states /taxpayers' claim. In other words, both GC and EC have denied the *ex-post* protection from State aid recovery based on the legal certainty principle.

The purpose of this section is to contribute to the ongoing debate on whether the EC was right to order the recovery or whether this was in breach of the legal certainty principle. Other substantive State aid arguments are outside the scope of this section. Therefore, we could assume that State aid was indeed granted.

This section is divided in five parts. The first part is the introduction of the section. The second part highlights that claiming the legal certainty protection from the State aid recovery is an impossible task, that, on the contrary, we argue that shall be possible. In the third and fourth sections, we argue that the GC and the EC have deprived taxpayers of the protection from the recovery order, based on the legal certainty principle. The contribution is based on two main arguments: (i) The General Court and the EC have not considered the legal certainty principle in its full extent and it has been strategically reduced to the legitimate expectations principle (ii) Moreover, the test to assess the foreseeability of the effect of law (which is the basis to assess the legal certainty protection) has been confused with the State aid compatibility test (which is the basis for evaluating whether deemed State aid is compatible with the Internal Market). In the last part, we conclude that these sources of confusion have deprived taxpayers of their rights to be protected by the legal certainty principle, which includes their *ex-post*

2020); S.U Khan Niazi, 'An Account of Recent Activity of the European Commission on Applying State Aid Rules to Income Taxes: In Retrospect and Prospect' (2016) Monash Business School Working Paper No 2016-03-01; Lovdahl Gormsen (n. 689); Kyriazis (n. 388); C. Quigley, 'Tax Rulings and State Aid' (2016) Tax Journal 8; M. Tenore, 'APAs and State Aid: A New Era of European Tax Law?' in D. Weber (ed), *EU Law and the Building of Global Supranational Tax Law* (IBFD, 2017); Joris and De Cock (n. 635); Monsenego (n. 67); R. F Hansen, 'Taking More Than They Give: MNE Tax Privateering and Apple's "Ocean Income"', (2018) 19(4) German Law Journal 693; R. A. Galendi (n. 514); Vos (n. 667); Peters (n. 397); P. Wattel, 'Case law Notes: Starbucks and Fiat: Arm's Length Competition Law' (2020) 48 (1) Intertax 119; A. Pantazatou, 'Taxpayers' Fundamental Rights and the Fiat Case', in M. Lang et.al(eds.) *CJEU: Recent Developments in Direct Taxation 2019* (Linde Verlag, 2020); Haslehner (n. 107).

[810] D. Kyriazis, 'Tax Rulings and State Aid: Musings on Recovery, in L. Hancher (ed.,), R*esearch Handbook on European State Aid Law*, (Elgar, 2021), 314-328; Bal (n. 567)351-382.

[811] P. V. Cleynenbreugel, Recovering Unlawful Advantages in the Context of EU State Aid Tax Ruling Investigations', (2017) Market and Competition Law Review, Vol. I, No. 1, PP.67-68. According to the Art. 16 (1) of Regulation 2015/1589 "*the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union Law*".

protection. Both the EC and GC have denied this protection with counter-arguments that do not fully address the applicants' claims to insufficient legal certainty protection.

3.4.2. Claiming the Legal Certainty Protection from Recovery: Mission Impossible that shall be Possible

Before arguing about the effective legal protection of the legal certainty principle against EC recovery, it is important to clarify that this protection shall be possible. The Council Regulation expressly provides an exception for recovery in the case of contrariety with a European general principle.[812] This form of protection was recognized by the CJEU even before the State aid Procedural Regulation entered into force.[813] The clear statement of the regulation can lead us to conclude that taxpayers are hence protected by this exception, *quod non*. Academics have expressed the improbability of being protected by the general principle in various ways. Pinto argues that this protection has a "*narrow meaning*",[814] Di Pietro affirms that "*the recipient will rarely be successful*",[815] Mason comments that "*high standard the EU courts use for excusing enterprise from recovery, [...] arguments [based on general EU principle's protection] are unlikely to succeed*",[816] Cleynenbreugel comments that "*Court of Justice interpreted them strictly*".[817] Others have even more extreme positions: Maitrot de la Motte argues that "*neither the principle of the protection of legitimate expectations nor that of legal certainty can be relied upon*",[818] Ghazarian argues that the recovery obligation is *"[…] at all cost. Hence, the superiority over the principle of res judicata*", and "*Member states enjoy virtually no protection by the principles of non-retroactivity*";[819] or in more iconic terms, Giraud comments that "*applicants seeking the benefit of the protection of legitimate expectations should, if not renounce altogether, at least abandon almost all hopes of succeeding in such an endeavor*".[820]

The following points bring to the attention how this sort of "*pessimism*" as regards the possibility of being protected from the EU general principles is founded on rules, and CJEU jurisprudence.

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[812] Case C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, ECLI:EU:C:1997:163, para 25 and Case C-5/89, *Bug-Alutechnik*, ECLI:EU:C:1990:320, paras 13 and 14. See also O. Stefan, 'General Principles in EU state aid law', in K.S. Ziegler, P.J. Neuvonene and V. Moreno-Lax (eds) *Research Handbook on General Principles in EU law*, , (Elgar, 2021) 441-461.
[813] Case C-1/73, *Westzucker*, [1973] ECR723 (729), para 5; Case C-223/85, *RSV* [1987] ECR 4617 (4659), para 17.
[814] Pinto (n. 314).
[815] Di Pietro (n. 697).
[816] Mason (n. 321).
[817] Cleynenbreugel (n. 783).
[818] Maitrot de la Motte (n. 453)
[819] L. Ghazarian, 'The Obligations of Member States, National Courts and National Authorities in State Aid Recovery and Recent Developments in the Case-Law of the Court of Justice of the European Union', (2016) European State Aid Law Quarterly, Vol.15, No.2,228-234.
[820] Giraud (n. 314).

TP rules are considered per se an inexact science and one of the most uncertainty tax issue of the current period;[821] domestic tax rulings (despite the principal aim is to provide legal certainty) cannot provide legitimate expectations since only the "*precise, unconditional assurance"* of the EU Institutions may trigger a possible protection;[822] within State aid law, not all EU institutions can provide legitimate expectations and precise assurance since only the EC is entitled to declare State aid compatibility;[823] the possible reliance on the similar EC previous decisions cannot provide legitimate expectations since the interpretation of the certain provisions on which these decisions are based is slightly different than the interpretation on which other previous decisions are based, therefore the EC approach is not innovative;[824] even in case of identical situations, or innovative approach, the EC is not bound by its previous decision-making practice, therefore, those decisions cannot provide legitimate expectations;[825] even if the residual case where the EU had first created a situation capable of giving rise to legitimate expectations, or in the case of legal uncertainty, the overriding public interest of recovery may preclude transitional measures from being adopted in respect of situations which arose before the new rules came into force but which are still subject to change;[826] the recovery of such aid, for the purpose of restoring the previously existing situation, "*cannot in principle be regarded as disproportionate*" to the objectives of the provisions of the EU Treaty relating to State aid;[827] in certain circumstances, the applicant must be able to prove that the result of comparison between the public interests in the recovery of the aid and the private interest (the protection of the general principle) is favorable to the beneficiary opposing the recovery;[828] Even when the retroactive order of recovery is claimed as non-proportional,[829] such claims are consistently dismissed by the EU courts, reasoning that the obligation to recover aid is a logical consequence of finding it unlawful.[830]

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[821] Cf.2.2.4. See also OECD Transfer Pricing Guidelines 2022, A.7.1., 163: "*because transfer pricing is not an exact science, there will also be many occasions when the application of the most appropriate method or methods produces a range of figures all of which are relatively equally reliable*" or 164: "*It is also possible that the different points in a range represent the fact that independent enterprises engaged in comparable transactions under comparable circumstances may not establish exactly the same price for the transaction*.".

[822] Joined cases T-50/06, T-56/06, and T-60/06, *Ireland v Commission, France v Commission, and Italy v Commission*. ECLI:EU:T:2012:134, para. 214.

[823] In Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium, Forum 187 ASBL v Commission*, ECLI:EU:C:2006:416, para 151. Case T-66/96 and T-221/97 *Mellett* ECLI:EU:T:1998:187, para 104; Case C-537/08 P *Kahla Thüringen Porzellan GmbH*, ECLI:EU:C:2010:769, para 64; Case T332/06 *Alcoa* ECLI:EU:T:2009:79, para 102.

[824] C-138/09, *Todaro Nunziatina &C*., ECLI:EU:C:2010:291, para 21.

[825] Ibid.

[826] C-183/95 *Affish* [1997] ECR I-4315, para 57.

[827] C-91/01, *Italy v. Commission*, ECLI:EU: C:2004:244, para 54.

[828] Case C-183/95, *Affish BV*, EU:C:1997:373, para. 57.

[829] Judgment TWD Deggendorf, supra; Friuli-Venezia Giulia, Case T-288/97, Judgment of 4.4.2001, EU:T:2001:115; Case T-20/03, *Kahla/Thüringen*, Judgment of 24.9.2008, EU:T:2008:395.

[830]Case C-142/87, *Tubemeuse*, Judgment of 21.3.1990, EU:C:1990:125, para. 66;, Case T-459/93, *Siemens*, Judgment of 8.6.1995, EU:T:1995:100, para. 96; Case C-169/95, *Spain v Commission*, Judgment of 14.1.1997, EU:C:1997:10, para. 47; Case T-298/97, *Alzetta Mauro and others,* Judgment of15.6.2000, EU:T:2000:151, para. 169.

From the previous points, it appears that the academic unwillingness on the legitimate expectations' protection is well founded.[831] If the principle of legitimate expectations represents a quasi-impossible, but available, taxpayers' protection from the State aid recovery, then the member states cannot rely on the same protection since the CJEU held that a member state cannot plead the legitimate expectations of an aid recipient to justify the state's failure to comply with its duty of notification.[832]

If the protection of the legitimate expectations principle is a quasi-impossible claim, the legal certainty protection runs into difficulties as well.[833] Under the State aid law framework, the principle of legal certainty usually comes into play in relation to the issue of the limitation period.[834] In EU State aid law, the EC is not entitled to recover the aid after 10 years that "*shall begin on the day on which the unlawful aid is awarded to the beneficiary"*.[835] Art. 17 of the Procedural Regulation prescribes a limitation period of 10 years beginning from the day the aid was awarded to the beneficiary. In the case of the unlawful aid (un-notified aid), the 10-year period begins from the date the EC can get notified.[836] The CJEU has decided that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid was lawful and, accordingly, declined to return that aid.[837] The applicant argued that, inasmuch as the EC, in taking 26 months to render the contested decision, disregarded the requirements of legal certainty, it failed to comply with the

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[831] Some authors remarkably support the protection of the legitimate expectations argument. See inter alia: R. Fadiga, Of Apples, Cars, And Coffee – Against The Commission's Remedy to Unlawful Tax Rulings, European Journal of Legal Studies, Vol.10 No.2, 2021.

[832] Case C-5/89, *Commission v Germany*, ECLI:EU:C:1990:320, para. 17:"*Member State whose authorities have granted aid contrary to the procedural rules laid down in [Art. 107 and Art.108 TFEU] may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a commission decision instructing it to recover the aid. If it could do so, Articles [107] and [108] of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the commission under provisions of the Treaty of their effectiveness*.". See also Case C-310/99, *Italy v Commission*, ECLI:EU:C:2002:143, para. 104.

[833] See J-J Fraimout, *Le principe de sécurité juridique à l'épreuve de la procédure communautaire de récupération des aides fiscales, in Mondialisation et fiscalité – La globalisation fiscale*, (Marc Leroy dir., L'Harmattan, 2006), 159. L. Leclercq & J. du Pasquier, 'Remise en cause d'aides d'État illicites : quid du principe de sécurité juridique?', (2016) 22 comm. 354 Revue de Droit Fiscal.

[834] The status of limitation is one of the forms of legal certainty protection that regards the EC possibility to investigate tax positions when a determined period of limitation elapses. Procedural time limits stem from a compromise between the need for the judicial review of the legality of the EU acts, and the need to respect legal certainty. As regards this compromise, see Case C-3/59 *Germany v High Authority* [1960] ECR 53, esp 61. 20. See also Schermers and Waelbroeck (n. 305). See Art. 17, Council Regulation (EU) 2015/1589 of 13 July 2015. See also A. van Eijsden and J. van Dam, 'The Impact of European Law on Domestic Procedural Tax Law: Wrongfully Underestimated?', (2010) 19(5) EC Tax Review, 199. See Case T-308/00 *Salzgitter v Commission* ECLI:EU:T:2004:199 [2004] ECR II-1933 and Case C-408/04 P *Commission v Salzgitter* ECLI:EU:C:2008:236 [2008] ECR I-2767.

[835] Art. 17, Council Regulation (EU) 2015/1589 of 13 July 2015, laying down detailed rules for the application of Article 108 of the Treaty on Functioning of the European Union: "*For reasons of legal certainty it is appropriate to provide for a period of limitation of 10 years with regard to unlawful aid, after the expiry of which no recovery can be ordered. […] "The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme […]*".

[836] Case C-138/09, *Todaro Nunziatina &C.* ECLI:EU:C:2010:291, para 21.

[837] If such a case is brought before a national court, it is for that court to assess the material circumstances-if necessary, after obtaining a preliminary ruling on interpretation from the CJEU. See Case C-298/00 P, *Italy v. Commission*, ECLI:EU:C:2004:240, para 86.

rules of good administration.[838] Effectively, the legal certainty principle prevents the EC from indefinitely delaying the exercise of its powers.[839] However, the Court has held that, where the EC has not been notified about the aid, any apparent failure to act on [the EC's] part in relation to the measure is irrelevant.[840] The EC attributes its lack of action to investigate tax rulings to the secrecy of those rulings.[841] The lack of notification and the secrecy of the rulings have made it impossible for the EC to investigate those rulings. Similarly to the legitimate expectations principle, claiming the legal certainty protection from the recovery appears an impossible task.

All in all, the recovery of illegal State aid is, in principle, should be denied in the case of an infringement of EU general principles.[842] The principle of legitimate expectation applies, but a legitimate expectation in the legality of aid can only exist if Article 108 TFEU is respected; a "*diligent*" entrepreneur must ascertain himself that Article 108 TFEU is being respected; when the procedure under Article 108 TFEU has not been respected, the recipients can only invoke the principle of legitimate expectations in exceptional circumstances; the exceptional circumstances can be a delay of the EC to exercise its power; and a member state cannot invoke the legitimate expectations principle on behalf of the recipient to avoid the obligation to recover illegal aid. Moreover, the CJEU has affirmed that governments are deemed to know the scope of the State aid prohibition and it cannot be maintained that the member states were unaware of the prohibition laid down in Article 108(3) TFEU.[843] Effectively, following this pattern, the only alternative is fatalism and resignation.[844] The legal certainty principle protection is impossible, but should not be.

In theory (and also in practice), the objectively unforeseeable effects, if any, of any legal provisions shall be protected by the legal certainty principle. As it was highlighted in the first Chapter of the present thesis, the CJEU takes EU law and its judgments as a reference to evaluate whether the effects of the law were unforeseeable.[845] As previously argued, the EC's approach (even if new) is irrelevant for the protection of the legal certainty principle.[846] The possible *ex-post facto* law (although the CJEU has never self-defined this possibility) can be

[838] Case C-223/85, *RSV v. Commission*, ECLI:EU:C:1987:502, para. 12
[839] Case C-74/00 P, *Falck and Acciaierie di Bolzano v Commission*, ECLI:EU:C:2002:524, para 140.
[840] Case C-81/10 P, *France Télecom v. Commission*, ECLI:EU:C:2011:811, paras. 58-60 (2011).
[841] J. Laitenberger, "State Aid Tax Cases: Sine Timore Aut Favore',' (May 20, 2016), DG Competition, keynote address at St. Gallen International Competition Law Forum, 6.
[842] Case C-5/89, *BUG-Alutechnik*, (also known as *Commission v. Germany*), ECLI:EU:C:1990:320.
[843] Case C-262/12, *Vent de Colère*, EU:C:2013:851, para 41.
[844] Gometz (n. 73)33.
[845] Cf: Cpt.2.4.5.
[846] Cf. Cpt 2.5.3.; The US secretary J. Lew in a letter of February 11, 2016 to the Commission's President J-C. Junker set forth the Department's primary concerns wit the Commission's investigations. Specifically, the Treasury argued that the EC's approach was new and deviated from existing case law (relevant for legal certainty), as well as from EC decisions (relevant for legitimate expectations). See Letter of U.S. Secretary of the Treasury Jacob Lew to Jean-Claude Juncker, President of the European Commission (Feb. 11, 2016).

achieved only through the CJEU judgments.[847] That is why to evaluate deemed uncertain legal position, the CJEU takes as reference exclusively EU law and its judgments.[848] Particularly, when there is a well-established case law on a certain EU provision, it is unlikely that the CJEU concedes the legal certainty protection.[849] Although the number of cases a valuable information, it should not be used as decisive point to evaluate the law effects, especially when difficult concepts are at stake, such as the selective advantage. As Advocate General Jääskinen has emphasised, "*despite the copious case-law on this subject, the concept of selectivity is difficult to tie down, in particular with regard to tax measures*".[850] The application of a novel interpretation and application of State aid should always be foreseeable, even in the absence of precise assurances.[851] The foreseeability test is the core aspect of legal certainty.[852] The foreseeable test should at least be present to eventually balance public interest or other principles.[853] Moreover, as regards the principle of clarity and definiteness, the CJEU has even established a rule of interpretation stating that vague laws shall be interpreted in favor of the addressee.[854]

Ab absurdum, we must assume that the effects of State aid law were "*objective unforeseeable*" at the point that the protection from the legal certainty principle should be granted. Unforeseeable State aids are not notified by definition. However, the CJEU' settled case law provides that "*so long as the Commission has not taken a decision approving aid and also so long as the period for bringing an action against such a decision has not expired, the recipient cannot be certain as to the lawfulness of the proposed aid which alone is capable of giving rise to a legitimate expectation on his part. It follows that the Commission*

[847] See Popovic and Kostic (n. 141). It must be pointed out that the possible convergence between the CJEU interpretation and the EC's interpretation is a coincidence. The effect of unforeseeable law effect are provided by the CJUE judgments. As regard the *ex-post facto* law, see J.D. Caytas, 'Tempted by an Apple: Europe's Fall from Grace on Retroactive Taxation', (2017) Columbia Journal of European Law, pp.209-210.

[848] Cf : Cpt.2.4.5. In the case at stake, the EC has also retroactively applied the OECD TP guidelines: See Action brought on 22 May 2018, Amazon EU and Amazon.com v. Commission, T-318/17: "*Eighth plea in law, alleging that the decision violates the principles of legal certainty, retroactivity, and non-discrimination, and an essential procedural requirement because it assesses the validity of the 2003 ATC by reference to post-dating OECD Guidelines. The decision retroactively and discriminatorily applies, and improperly holds the applicants and Luxembourg to, standards in the 2017 OECD Guidelines on transfer pricing first issued after the Commission opened the procedure under Article 108(2) TFEU, and long after the adoption of the 2003 ATC*". See also Action brought on 14 December 2017, Luxembourg v. Commission, T-816/17, 5th plea in law: "*the recovery of the aid is incompatible with the principle of legal certainty, considering the good faith of the Grand Duchy of Luxembourg in the application of transfer pricing and the fact that the new transfer pricing approach applied by the Commission in the contested decision could not have been foreseen*".

[849] Case C-61/79, *Denkavit Italiana* [1980] ECR 1205, para. 21; Case C-57/93, *Vroege* [1994] ECR I-04541, paras. 28-30; Joined Cases C-367/93 to C-377/93, *Roders and others* [1995] ECR I-02229, para. 45; Case C-415/93, *Bosman* [1995] ECR I-04921, para. 146; Case C-104/98, *Johann Buchner* [2000] ECR I-3625, para. 40.

[850] Opinion of Advocate General Jaaskinen, Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:215, para 176. See also Merola who argues that "the application of selectivity criteria to taxation matters can be said to be an unsolved rebus in light of relevant caselaw and the Commission's practice"; Merola (n. 379).

[851] E. Sharpston, 'European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom' (1990) 11(1) Northwestern Journal of International Law & Business 87, 93.

[852] T C Hartley, *The Foundations of European Community Law* (6th edn, Oxford University Press, 2007).

[853] Schön argues about a « fine balance" between providing legal certainty and granting illegal benefits to taxpayers. Schön (n. 36). See also P. López, 'The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond', (Oxford University Press, 2015), 93 et seq.

[854] Case C-169/80 *Administration des Douanes v Gondrand Frères* [1981] ECR 1931, para 17 et seq.

did not infringe the principles of protection of legitimate expectations and legal certainty".[855] Member states shall know whether the measure is State aid or not and the lack of notification imply the denial of protection of the legal certainty principle.

Considering the unfavorable case law on the application of the legal certainty principle when the notification procedure has not been followed, we may face three main absurd situations. Firstly, the general principle of legal certainty applies across EU law, except State aid law. This should not be the case, since the general principles are general by definition, therefore have to be applied effectively in all areas of EU law, State aid law included. Secondly, the Procedural Regulation (and CJEU jurisprudence) - that specifically provides a protection from the recovery based on the general principles, - would become an empty norm deprived of its effects. Lastly, if the recovery of the State aid is considered (by definition) a supreme interest compared to the private interest of being protected by the foreseeability requirement of the legal certainty, again, in this case the general principle of legal certainty applies in all areas of EU law, except State aid law, and thus the Procedural Regulation becomes an empty norm.

However, the general principles of EU law, being general, apply in all areas of EU law, State aid included. In case of "*unforeseeable law effect*", the consequence would be that member states would be objectively incapable to foresee the State aid qualification with the aftermath of missing the required notification. This impossibility shall be protected or at least should be evaluated and then balanced by reducing the recovery effect. Moreover, the specific context of tax rulings that intrinsically support the legal certainty and the legitimate expectations principles may justify the successful invocation of the EU law principle to mitigate or reduce the retroactive judgment effects. In other terms, the protection of the State aid recovery shall be possible. To test whether the unforeseeable law effects are objective or not, the CJEU exclusively considers the EU law, and its judgments.

In the following sections, it will be argued that the member states and the taxpayers are deprived of the legal certainty protection since the foreseeably test is missing. Both the GC and the EC have unduly denied the legal certainty protection, because (i) the legal certainty principle is not considered in its full extent and it is strategically reduced to the legitimate expectations principle (ii) Under the recovery of aid, the legal certainty analysis does not coincide with State aid analysis.

[855] Case C-91/01, *Commission v. Italy*, ECLI:EU:C:2009:66, paras. 66–67.

3.4.3. The Approach of the EC and the GC to Recovery in the Tax Rulings' Cases: The Legal Certainty Principle is not Applied Consistently to all its Sub-Principles

Consistent with the legal theory,[856] the CJEU has qualified the legal certainty principle in a notion composed by several sub-principles: (i) predictability and clarity of law (foreseeability); (ii) the principle of legitimate expectations; (iii) the non-retroactivity of EU legislation; (iv) the principle of acquired (vested) rights; (v) the requirement of procedural time-limits; (vi) and the requirement for understandable language.[857] The "umbrella principle status" of the legal certainty principle has been confirmed by the Venice Commission of the Council of Europe that has published a checklist to test the actual multi-form application: (i) "*are laws accessible?*", (ii) *"Are count decisions accessible?",* (iii) "*are the effects of laws foreseeable?*", (iv) "*are laws stable and consistent?"*, (v) *Is respect for the principle of legitimate expectations ensured?"*, (vi) *"Is retroactivity of legislation prohibited?"*, (vii) "*Do the nullum crimen sine lege and nulla poena sine lege principles apply?, (viii) Is respect of res judicata ensured?".*[858] As we have already discussed in the previous Chapter, the legal certainty principle is a broad concept that cannot be reduced to one of its sub-principles, such as the legitimate expectations principle.[859] In the current State aid investigations on tax rulings, all investigated member states (except Starbucks and the Netherlands) have allegedly breached the principle of legal certainty. Both the GC and the EC have denied the legal certainty protection. In the following part, we argue that both GC and the EC: (i) have not considered the legal certainty principle in its full extent and it has thus been strategically reduced to the legitimate expectations principle; (ii) does not precisely cover the advanced arguments with precise counter-arguments.

In the *Apple* case, Ireland argued that (i) "[a] *reasonable and diligent taxpayer could not have foreseen the Commission's prima facie finding of incompatible State aid*", and the EC is comparing Ireland's tax rules to an external reference framework*, "which is contrary to its long-standing case-law that the only valid reference is the national tax system*".[860] Specifically, Ireland argued that State aid rules "*must be predictable*" and "*the Commission is not entitled to develop Union law by extending the boundaries of those rules in a novel way or by reference to international developments like the OECD framework*". By applying the arm's length principle and the OECD interpretation (in particular the OECD Guidance of 2010), the EC "*is retrospectively imposing an external reference framework that was not part of Irish domestic law at the time*".[861] The EC's retroactive application of today's principles means that Ireland is being held to a standard that "*could not have anticipated when the rulings were issued*". Ireland argued about (i) the foreseeability (or predictability) of the effect of legal provision (the third Venice requirement check); the retroactivity (the sixth Venice requirement), and consistency (the fourth Venice requirement).

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[856] See :2.3.
[857] See 2.3/2.4.
[858] See 2.3/2.4.
[859] See: 2.4.5.
[860] EC Final Decision, *Apple*, para 178 and the reported Observations of Ireland on the Opening Decision, para 90.
[861] EC Final Decision, *Apple* para 439.

The EC's counter-arguments do not cover the advanced arguments. Firstly, the EC affirmed that there was no breach of the legal certainty principle by the EC's prolonged lack of action.[862] Apple and Ireland have not called into question the EC's prolonged lack of action, but the foreseeability of the effects of the law, as interpreted and proposed by the EC. On the contrary, the prolonged lack of action coincides with the CJEU jurisprudence that has clarified the procedural time-limits and, to some extent, the CJEU jurisprudence about the principle of acquired (vested) rights.[863] Although vested rights and time limitation periods fall within the legal certainty principle, they cannot be confused with the foreseeability requirement.[864] The former protects the rights to have a legal position that ought to be stable after a determined period of time or after a determined act. The latter is an *ex-post* protection of the *ex-ante* capability to foresee legal effects. Apple and Ireland have not pleaded vested rights or limitation period.

On the contrary, Amazon argued that since 10 years have elapsed (the time limitation to recovery State aids), the EC is barred from ordering recovery.[865] As regards the "*limitation period*", and the "*indefinitely delaying the exercise of its power*", the EC counter-argued that when a measure has been granted without the EC having been notified, the EC has not failed to act, and the mere fact that there has been a delay in ordering recovery does not suffice to render that the recovery decision is unlawful under the legal certainty principle.[866] Since the EC could not have learnt about the existence of the measure, lack of action cannot be interpreted as an implicit authorisation of the measure. It seems that the EC strategically brought a counter argument that is easier to defend since the limitation period starts after the time when the EC is aware of the fact (since there was not notification) and the lack of notification has deprived taxpayers to count on the limitation period.

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[862] The fifth CJEU sub-principle of the legal certainty principle prevent the EC from indefinitely delaying the exercise of its power. See EC Final Decision, *Apple*, para 440, citing Case C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* EU:C:2002:524, para 140. See also Case C-408/04, *Salzgitter Ag, Germany, v Commission*, ECLI:EU:C:2008:236, para 106: "It follows from the above that, where aid was granted under the ECSC Treaty without having been notified, a delay by the Commission in exercising its supervisory powers and ordering recovery of the aid does not render that recovery decision unlawful, except in exceptional cases which show that the Commission manifestly failed to act and clearly breached its duty of diligence."

[863] The EC affirmed that the long lapse of time as such is insufficient to claim legal certainty since the tax rulings were never notified, and the EC had the possibility to know their existence from the time they were publicly disclosed, which happened for the first-time during hearings of the US Senate.

[864] Cf. 2.4.3.,2.4.5.

[865] EC Final Decision on *Amazon*, para 326. The limitation period was raised in the *BFM* case since prior to 1999, there had been not provisions that limit recovery as regards state aid law. This changed slightly when Regulation 659/1999 came into force. See, Joined Cases T-126/96 and T-127/96, *BFM* Judgment of 15.9.1998, EU:T:1998:207, para. 61, where the GC dismissed the claim since state aid law did not provide expressly limitation period in relation to the recovery order. In *Salzgitter AG*, the CJEU clarified that even in a situation where the Community law has not expressly indicated any limitation period, the Commission cannot indefinitely delay the exercise of its power: see Case T-308/00, *Salzgitter AG*, Judgment of 1.7.2004, EU:T:2004:199, para. 103.

[866] EC Final Decision *Amazon*, para 625. Case C-408/04 *Commission v Salzgitter*, EU:C:2008:236, paras 100-107. See also Case C-471/09, *Territorio Histórico de Vizcaya*, ECLI:EU:C:2014:2304, para 68. Case C-183/02 P *Demesa andTerritorio Histórico de Álava v Commission*, EU:C:2004:701, para 52.

The "*lack of notification*" argument is also a legal basis to support the impossibility to invoke the protection of the legitimate expectations.[867] When the EC is precisely counter arguing the member state's reliance on the legal certainty, it restricts the grounds upon which that principle may be invoked on (i) manifestly failed to act, (ii) breached its duty of diligence in the exercise of its supervisory powers.[868] Within this interpretation, the legal certainty principle is deprived of any form of foreseeability since its content is reduced on a formalistic elapsed period of time.

In the *Fiat* case, the GC recognised the foreseeability component.[869] However, the GC restricted the foreseeability with the predictability that the "*Commission would be able to verify*" the State aid violation.[870] It must be recalled that the legal certainty is about the content of the law and the ability to foresee the effects of that content, which is more than foreseeing the "*ability to verify*".[871] *Ad absurdum*, in the event that the EC would argue that different member states' tax rates might be qualified as State aid, the foreseeability regards the ability to predict the "new" content of the law rather than foresee the EC's ability to investigate whether a different tax rate of member states could be qualified as State aid.

It seems that both the EC and the GC did not assess the possible un-foreseeable law effects of the current EC's interpretation by supporting counterarguments that do not precisely cover the claims advanced by the member states and the taxpayers.

Moreover, both the EC and the GC do not cover taxpayer (and member states) claim of legal certainty protection, since they use counterarguments related to legitimate expectations.[872] One of the main points that generates this confusion boils down to the reliance on the "*EC decisional practice*". In the *Apple* case, the EC stated that Ireland argued that the EC is acting "*against its decisional practice"* by imposing an external reference system and applying guidance from 2010 to a ruling issued before that date.[873] Actually, Ireland did not argue that the EC is acting "*against its decisional practice*", but argued that EC is acting contrary to *"longstanding case-law [supporting that] the only valid reference is the national tax system"*. The difference is that Ireland relied on the protection of the legal certainty principle rather than the protection of the legitimate expectations. In the EU legal order, only the CJEU has the duty and the right to interpret EU law by clarifying (and reducing uncertainties) the content of the EU law provisions.[874] On the contrary, although the EC is putting maximum effort in clarifying EU law via guidelines, notices, and, to some extent, Decisions, those legal instruments do not bind neither the CJEU

[867] EC Final Decision *Amazon*, para 626, citing Joined Cases C-471/09 P to C-473/09 P *Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission* EU:C:2011:521, para. 64; see also Joined Cases C-465/09 to C-470/09 *Diputacion Foral de Vizcaya e.a./Commission*, EU:C:2011:372, para 150 and Case C-372/97 *Italy v Commission* EU:C:2003:275, para 112.
[868] The EC arguments are based on the Case C-408/04 *Commission v Salzgitter*, EU:C:2008:236, paras 100-107.
[869] Case T-755/15, GC 24.09.19, *Luxembourg v Commission* (Fiat), para 181.
[870] Ibid, para 183.
[871] Ibid, para 181.
[872] As regards the differences between legal certainty and legitimate expectations, see 2.4.5.
[873] EC Final Decision on *Apple*, para 441.
[874] Cf. 2.5.2.

nor the member states.[875] Therefore, the EC is not able to clarify the content of the law and its decisional practice is not suitable to test whether the content of law was foreseeable or not. Amazon relied on the protection of both principles. Amazon claimed the protection of the legal certainty principle since the EC was adopting "*an incorrect definition of the reference framework*".[876] Amazon argued about an "*unprecedented and novel approach*":(i) by invoking the protection of legitimate expectations,[877] and (ii) by citing EC Decisions rather than CJEU case law.[878] The "*against its decisional practice*" argument was also proposed by Belgium in the *Excess Profit* case and Luxembourg in the *Fiat* case,[879] where both countries relied on the principle of legal certainty rather than the one of legitimate expectations.

This sort of confusion may be clarified by outlining the taxpayers' claims (i) the protection of the legal certainty principle based on the previous EC decision-making practices, (ii) the protection of the legal certainty principle based on the long-standing CJEU case-law, (iii) the protection of the legitimate expectations based on the EC decision-making practices. As it will be highlighted, in some situations, the EC used the legitimate expectations doctrine to defend against arguments advanced under the legal certainty principle. Within legitimate expectations, the EC supported the "*precise assurance*" requirement.[880]

The distinction between "*against its decisional practice*" and "*contrary to longstanding case-law*" is fundamental to test whether the effects of the law was foreseeable rather than giving precise assurances. For example, Ireland was arguing about foreseeability, and the EC was arguing about the legitimate expectations by referring to "*its decision practice*" rather than the foreseeability of the legal effects. The scope of the legal certainty principle is larger than the scope of legitimate expectations, since the latter is a sub-element of legal certainty. Moreover, the legal certainty principle does not require a prior declaration (or precise assurance) by the EU institutions,[881] but simply that "*legal rules be clear and precise, and aim to ensure that situations and legal relations governed by Community law remain foreseeable*".[882] Under the CJEU case-law, and the Venice checklist, questions, such as *"(iii) are the effects of laws foreseeable?, (iv) are laws stable and consistent?, (vi) is retroactivity of legislation prohibited?"* are different from: *"(v) Is respect for the principle*

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[875] Cf: 2.5.3.

[876] Joined Cases T-816/17 and T-318/18, *Grand Duchy of Luxembourg, Amazon EU Sàrl and Amazon.com, Inc. v European Commission*, ECLI:EU:T:2021:252, para 168.

[877] EC Final Decision on *Amazon*, para 326.

[878] *Amazon* refers to the *France Telecom* case (Commission Decision of 2 August 2004, C13a/2003 (ex N779/2002) – France Telecom, para 263), where the Commission refrained from recovery on the basis of novelty of the measure.

[879] EC Final Decision, *Fiat*, paras 127, 360, citing the Commission Decision 2014/200/EU of 17 July 2013 on State aid SA.21233 (C/11 ex NN/11 ex CP 137/06) implemented by Spain – Spanish tax lease scheme.

[880] The right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the Community authorities have caused him to entertain legitimate expectations Case T-290/97 *Mehibas Dordtselaan* v *Commission* EU:T:2000:8, para 59 and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL* v *Commission* EU:C:2006:416, para 147. See also Case C-265/85 *Van den Bergh en Jurgens and Van Dijk Food Products v Commission* [1987] ECR 1155, para 44, Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, para 26, Case T-203/96 *Embassy Limousines & Services v Parliament* [1998] ECR II-4239, para 74, and Case Joined Cases T-481/93 and T-484/93, *Exporteurs in Levende Varkens and Others*, ECLI:EU:T:1995:209, para 148). However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration (Case T-571/93 *Lefebvre and Others v Commission* [1995] ECR II-2379, para 72, and Case T-113/96 *Dubois et Fils v Council and Commission* [1998] ECR II-125, para 68).

[881] *See*, *ex multis*, Case C-265/85, *Van den Bergh en Jurgens BV v. Commission*, ECLI:EU:C:1987:121, para. 45; Case C-344/85,*Ferriere San Carlo s.p.a. v. Commission*, ECLI:EU:C:1987:486, para. 13.

[882] Case C-63/93, *Duff and others*, ECLI:EU:C:1996:51, para 20; CaseT-348/03, *Friesland Foods v. Commission*, ECLI:EU:T:2007:256, para.125.

of legitimate expectations ensured?" Effectively, the argument proposed by the EC, namely,"*against its decisional practice*" founds easy counter-arguments since legitimate expectations require precise assurances.[883]The EC expanded the concept of precise assurances by citing the legitimate expectations arising "*from a previous behaviour of the Commission that, for instance, had already adopted a decision on the same or identical aid scheme*",[884] and not directly addressed to the taxpayer.[885] In terms of legal certainty, the CJEU can provide certainty or indirect certainty in similar cases.

On the contrary, the EC past decisions could not be used as a reference to provide certainty since the EC's practice does not bind the CJEU and the EC neither.[886] This argument is valid also in the opposite scenario when the EC argued in its favour about the "*number of decisions declaring schemes deviating from the arm's length principle as giving rise to State aid*".[887] If its own practice does not bind the EC, its "*own decisional practice*" could not be cited neither for nor against the case under investigation. In effect, the precise assurance represents one of the requirements of the principle of legitimate expectation, which is not necessary to be protected by the legal certainty principle.

The legitimate expectation principle has another limit compared to the legal certainty principle, since the former operates exclusively in favour of the taxpayers. A member state cannot seek protection for themselves. Ireland and Luxembourg invoked the protection of the legitimate expectations, when they argued that the aid granted by the contested tax rulings would be difficult to quantify.[888] Since taxpayers (such as Apple) did not invoke that principle in any of their observations submitted to the EC, the member state's reliance on legitimate expectations is for that reason alone unfounded.[889] Only taxpayers can rely on the principle of legitimate

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[883] EC Final Decision, *Apple*, para 442, citing Case C-265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik) v Commission* EU:C:1987:121, para 44, and Case C-537/08 P *Kahla Thüringen Porzellan v Commission* EU:C:2010:769, para 63.

[884] EC Decision *Amazon*, para 636.

[885] In this respect, when there is a direct precise assurance, the EC accepted that the principle of legitimate expectation could prevent recovery by allowing a transitory period in favour of Belgian coordination centres by modifying its Decision 2003/757/EC, OJ, 2008, L 90. See also EC Decision 2014/200/EU of 17 July 2013 on State aid SA.21233 (C/11 ex NN/11 ex CP 137/06) implemented by Spain – Spanish tax lease scheme.

[886] See Case C-138/09 *Todaro Nunziatina & C.*, ECLI:EU:C:2010:291, para 21.

[887] EC Decision *Amazon*, para 636, citing, for example, Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) (OJ 1999 L 292, p. 1); Commission Decision C(1999) 1122 of 21 April 1999 on the treatment by the Netherlands tax authorities of a technolease agreement between Philips and Rabobank (OJ 2000 L 297, p. 13); Commission Decision 2000/795/EC of 22 December 1999 on the State aid implemented by Spain for Ramondín SA and Ramondín Cápsulas SA (OJ 2000 L 318, p. 36); Commission Decision 2005/709/EC of 2 August 2004 concerning State aid paid by France to France Telecom (OJ 2005 L 269, p. 30); Commission Decision of 11 December 2007 on State aid C 12/07 (ex N 799/06) planned by the Slovak Republic for Glunz & Jensen s.r.o., OJ L 178, 5.7.2008, p. 38; Commission Decision of 4 June 2008 on State aid C 57/07 (ex N 843/06) which the Slovak Republic is planning to implement for Alas Slovakia, s.r.o. OJ L 248, 17.9.2008, p. 19; and Commission Decision of 26 May 2010 in State Case C 76/03 (ex NN 69/03) concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA) (OJ 2011 L 122 p. 76).

[888]EC Final decision, *Apple*, para 442, citing the Observations of Ireland on the Opening Decision, paras 155 and 156. The same argument was submitted by Belgium in the EC final decision in the Excess Profit case, para 197.

[889] EC Final Decision *Apple*, para 442.See Case T-67/94 *Ladbroke Racing v Commission*, EU:T:1998:7, paragraph 183; See also Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA and Diputacion Floral de Vizcaya v Commission*, EU:T:2003:217, para 203; EC Final Decision *Fiat*, para 362.

expectations.[890] On the contrary, the legal certainty principle is not exclusively addressed to taxpayers, but also to legislative bodies, administrative authorities when issuing administrative orders.[891]

The concerning confusion between legal certainty and legitimate expectations may be founded in the EC Decision in *Apple*, where both principles were mentioned in the same line and as part of the same argument: "*Legal certainty, and legitimate expectations"*[892]*,* as well as in some CJEU case law.[893] The indistinction between the two principles can be found also in scientific articles.[894] This common confusion can be justified by the fact that the CJEU in only few cases has expressly highlighted the difference. In the *Salzgitter* case, the GC distinguished between the two principles: "*However, the applicant is not pleading a legitimate expectation that aid was properly granted but rather a breach of the principle of legal certainty, a matter which does not depend solely on the conditions required for the creation of a legitimate expectation on the part of the recipient of the aid*".[895]

In the current State aid cases on TP, there is the same confusion between the legal certainty principle and the legitimate expectation principle. As we have seen in the CJEU case law, academic debates, and the Venice Report, legitimate expectations the legal certainty principle's sub-part. Furthermore, legal certainty and legitimate expectations are even listed as two separated principles in the EC Notice on the recovery of unlawful and incompatible State aid.[896]

In the *Fiat* case, the GC correctly recalled the legal certainty concept emphasising that the "*law remains foreseeable*". [897] However, it also referred to the "*previous [EC] decision-making practice*", and, as we have seen in the previous section,[898]the EC does not have any power to clarify EU law since its interpretation does not bind the CJEU. The "*EC decision-making practice*" may have relevance for the protection of the legitimate expectations rather than the legal certainty principle. The shift to the "*EC decision-making practice*" rather than the "*CJEU case-law*" appears to be a strategy that aims to facilitate the demonstration of the lack of the precise assurances. When the CJEU test the foreseeability of law provision take exclusively into consideration EU law and its case-law.[899] Moreover, the reference to the "CJEU case-law" would not require precise assurance. Again, the principle of legitimate expectations is mixed with the principle of legal certainty. Same as in the *Salzgitter* case, the applicants pleaded for the protection of the legal certainty principle, and both EC and GC replied with legitimate expectations-related

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[890] Case T-109/01, *Fleuren Compost*, Judgment of 14.1.2004, EU:T:2004:4, para. 143; Case T-67/94, *Ladbroke Racing*, Judgment of 27.1.1998, EU:T:1998:7, para. 183.

[891] Case T-43/02 *Jungbunzlauer AG v Commission*, ECLI:EU:T:2006:270 [2006] ECR II-3435, para 72.

[892] EC Final Decision, *Apple*, Art. 11.3.

[893] Case C-21/81, *Openbaar Ministerie*, Judgment of 10.2.1982, EU:C:1982:47; Case C-34/92, *GruSa Fleisch*, Judgment of 15.7.1993, EU:C:1993:317; Case C-162/00, *Pokrzeptowicz-Meyer*, Judgment of 29.1.2002, EU:C:2002:57; Case C-441/08, *Elektrownia Pqtn6w II*, Judgment 12.11.2009, EU:C:2009:698.

[894] R. Fadiga, Of Apples, Cars, And Coffee – Against The Commission's Remedy to Unlawful Tax Rulings, European Journal of Legal Studies, Vol.10 No.2, 2021.

[895] Case T-308/00, *Salzgitter AG*, Judgment of 1.7.2004, EU:T:2004:199, para. 166.

[896] See Chapter 2.4.1.1. as regards the legal certainty principle and Chapter 2.4.1.2. as regards the legitimate expectations principle, in EC Notice on the recovery of unlawful and incompatible State aid, 2019/C 247/01, 23.7.2019.

[897] Case T-755/15, *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission*, ECLI:EU:T:2019:670, para 405.

[898] See 2.5.3.

[899] See 2.5.3.

arguments. [900] The foreseeability test is fundamental to verify compliance with the legal certainty principle,[901]and it appears that the test has never been really utilised.

In the same vein, Ireland was arguing about the deviation from the predictability of the content of the law provided by the CJEU, rather than the EC deviation from its own decisions. The argument of Ireland, namely based on the deviation from the previous CJEU judgments, was consistent with the CJEU's test to verify the possible unforeseeability of law effect, which is also based on EU law and the CJEU case-law.[902] The Court is the only authority that has the power to interpret the EU treaties, thus reducing uncertainty. The CJEU is neither bound by the EC decisions, nor the EC Guidelines. Therefore, the EC decisions as well as the EC Guidelines do not actually contribute towards legal certainty.[903] The exclusive reference to evaluate the predictability of norms is in reference to the EU Treaties, and the correspondent CJEU interpretations. Ireland argued about the consistent case law as regards the internal reference system since the CJEU clarified, by reducing uncertainty, how to interpret the EU Treaties.
On the contrary, the EC recalled that the conclusion in this Decision was based on an infringement of Article 107(1) of the Treaty, which has been a part of Ireland's legal order since 1973.[904] This statement is clearly formalistic. It presumes that the content of the Treaties has been foreseeable from the moment of their enactment. The EC statement, taken as such, jeopardises the effectiveness of the legal certainty principle. In other words, the EC stated that whatever content is given to State aid law, foreseeable or not foreseeable, the sole promulgation of the law covers all requirements provided by the legal certainty principle. However, the retroactivity covers not only the promulgation of the law, but also retroactive interpretation implying content changes of the same norm by authorities which understood it in a different sense.[905] It must be recalled that under the CJEU case-law, legal certainty requires that rules have to be clear and precise and "*predictable in their effect*", so that interested parties can ascertain their position in situations and legal relationships governed by EU law.[906] Counter-arguments based on a formalist promulgation approach rather than on taking into account "*their effect*" jeopardise any effort to make the content of the predictable. In the AG's opinion in Case C-898/19 P Ireland v. Commission 2021, the AG Priit Pikamäe pointed out that the use of arm's length standard for the purpose of analysing the existence of a State aid advantage is a new approach, but that it does not infringe the principle of legal certainty. The legal certainty principle does not require that the new interpretation that the EC wishes to introduce into the analysis carried out under Art. 107(1) of the TFEU is set out in advance in

[900] Case T-308/00, *Salzgitter AG*, Judgment of 1.7.2004, EU:T:2004:199, para. 166.
[901] See Fraimout (n. 804), 159. See also Leclercq and du Pasquier (n. 804).
[902] See 2.4.5.
[903] See: 2.5.3.
[904] EC Decision on Apple, para 441.
[905] Popovic and Kostic, (n. 141).
[906] Case C-48/14, *Parliament v Council*, EU:C:2015:91, para. 45. For another slightly different used formulation, see Case C-308/06, *Intertanko,* EU:C:2008:312, para. 69: *"[...] the general principle of legal certainty, which is a fundamental principle of Community law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly*".

manuals or guidelines.[907] Again, the foreseeability of the effect of law is disregarded and the assessment is based on the methodology of the EC rather than the analysis of the CJEU judgments and the foreseeability of the effects of law. Within the EU, the judiciary plays an important role in their ultimate definition of the rules' normative content, and consequently, the clarity of the laws.[908] Due to its transversal character, legal certainty is not limited to preventing the validity of general norms, but also their applicability, and interpretative effects over other norms.[909] From this perspective, the CJEU does not make a distinction between the makers, implementers and supervisors of norms, and all situations fall under the scope of the legal certainty protection.[910] Moreover, the procedure shall not be confused with the content. The CJEU has state the presumption of the non-validity of retroactive law effects, and this presumption is confirmed in both procedural and substantive terms. [911] In procedural terms, the CJEU has clarified that it will interpret measure as having retroactive effect only if this clearly follows from their terms, or from the objectives of the general scheme of which they are part.[912] In substantive terms, the CJEU strike down measures that have retroactive effect where there is no pressing Union objective. In Meiko-Konservenfabrik the CJEU struck down a Regulation that has retroactive effect since the new content could not have been reasonably anticipated by the parties, although the procedure has been respected.[913] As have been already discussed, the compliance with procedures is irrelevant to assess the foreseeability of norms, only their effect matters. Therefore, the judgments of the GC in Engie that denies the legal certainty protection - since the methodology used by the EC to prove the selectivity is well founded in established case law – should not be upheld.[914]

As it has been highlighted, the moment of certainty arises when the CJEU delivers its judgment.[915] It is evident that the legal questions referred to the CJEU usually differ from case to case. However, judgments often have some legal aspects that go beyond the case at hand and can have general effects. In terms of contribution to certainty and then the reduction of

[907] Case C-898/19 P Ireland v. Commission, ECLI:EU:C:2021:1029, AG's opinion, 2021.
[908] See, *inter alia*, on the concept of *de facto* precedent M. Jacob, Precedents and Case-based Reasoning in the European Court of Justice, (Cambridge University Press, 2014); M. Payandeh, 'Precedents and Case-based Reasoning in the European Court of Justice' (2014) International Journal of Constitutional Law, Volume 12, Issue 3, 832–835.
[909] P. M. Rodrigue (n. 283), citing Case C-26/13Kásler y Káslerné Rábai, , EU:C:2014:282, para. 65, and Case C-176/12 Association de médiation sociale, EU:C:2014:2, para. 39; Case C-80/86Kolpinghuis Nijmegen, EU:C:1987:431, paras. 13-14 and Case C-105/03Maria Pupino, EU:C:2005:386, paras. 44-45.
[910] See Case C-169/80, Administration des douanes v. Société anonyme Gondrand Frère, ECLI:EU:C:1981:171, , para 17: "The principle of legal certainty requires that rules imposing charges on the taxpayer must be clear and precise so that s/he may know without ambiguity what her/his rights and obligations are and may take steps accordingly". Also see Joined Cases C-92 and 93/87Commission of the European Communities v French Republic and United Kingdom of Great Britain and Northern Ireland; ECLI:EU:C:1989:77, para 22.
[911] In case T-7/99 Medici Grimm KG v Council, the CJEU upheld the validity of retroactive measures, particularly in the agricultural sphere where they were necessary to ensure market stability, or there the retroactivity placed the individual in a more favorable position.
[912] Cases 212-217/80 Amministrazione delle Finanze dello Stato v Srl Meridionale Industria Salumi, ECLI:EU:C:1981:280, 1981; Case C-161/06 Skoma -Lux.
[913] Case C-256/07 Mitsui & Co Deutschland GmbH v Hauptzollamt Dusseldorf, ecli:EU:C:2009:167, 2009.
[914] Case T-516/18, Lucembourg v. Commission, ECLI:EU :T :2021 :251, para 501.
[915] See 2.5.2.

uncertainty, the first judgment that introduced the concept of "*free market competition reference*" was the case of *Forum 187* in 2006.[916] Although it is debated in the literature,[917] the EC pursued the line that the "*free market competition*" means the application of the arm's length standard to assess the possible infringement of State aid law. In the academic literature, the exclusive EC reliance on the *Forum 187* judgement has raised numerous concerns.[918]

For simplification and exclusively for the following reasoning, we assume that the EC is right on citing the *Forum 187* case.[919] From the foreseeability standpoint, the year that should be considered should have been 2006 rather than 1973, namely the year when the *Forum 187* case was published. This is the moment of clarity or the moment of reduced uncertainty. To reflect on the relevance of 2006, it may be pointed out that the CJEU judgments usually have automatic retroactive effect.[920] In other words, the interpretation given by the CJEU to EU law determines its meaning as it ought to have been understood since the time of its entry into force. [921] This view entails that the EC has the right to consider 1973 as the point of reference for the foreseeability standpoint. However, since 1976 the CJEU has acknowledged that this approach may undermine the EU legal certainty, therefore limiting the temporal effects of its judgments.[922] The Court made it clear that "*only exceptionally*", in applying the general principle of the legal certainty, the limitation finds application under certain criteria or so-called "*exceptional cases*".[923] The developed criteria are (i) the good faith, (ii) serious economic repercussion, and (iii) legal certainty. [924]

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[916] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission*, EU:C:2006:416, paras 95 and96.
[917] For example, Joris and De Cock argued that the European Court of Justice did not intend to endorse the arm's length standard in its judgments, and that the EC overstretches the impact of this judgment: See Joris and De Cock (n. 635).
[918] Rossi-Meccanico highlighted the EC's reliance on the concept of advantage without proving the selectivity; Nicolaides highlighted that the judgment requires that every associate has to bear all of its costs without requiring a correlated adjustment with the arm's length principle; Kyriazis pointed out that the CJEU did not refer to the "arm's length principle"; Wattel reduced the relevance of the judgments on the fact that the ordinary tax system should be applied to all covered taxpayers. See Rossi-Maccanico (n. 635); Nicolaides (n. 519); Kyriazis (n. 388); Wattel (n. 599)794. See also Forester, who argues that "*The current investigations into numerous MNE, for instance Apple, signify a radical new approach adopted by the Commission, one which could not have been predicted by neither the Member States nor corporations*." in*:* Forrester (n. 33).
[919] It must be pointed out that, even if we agree that the CJEU endorsed the arm's-length income allocation standard in *Forum 187*, in that case the member state had itself adopted the standard in domestic law. Joined Cases C-182/03 and C-217/03, *Forum 187 ASBL*, EU:C:2006:416.
[920] See, *inter alia*, Case C-292/04, *Meilicke and Others v. Finanzamt Bonn-Innenstadt,* ECR I-1872, para 35.
[921] As regards the retroactive interpretation of the CJEU, see Koopmans (n. 331); Waelbroeck (n. 331); Seer (n. 331); Wiedmann (n. 331). Lang (n. 331)
[922] Case C-43-75 *Defrenne v Sabena* [1976] ECR 455. See also Popovic and Kostic (n. 141)
[923] Case C-292/04, *Meilicke* [2007] ECR I-1872, para 35 et seq ; Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, para. 28; Case C-163/90, *Legros and Others* [1992] ECR I-4625, para. 30; Case C-415/93, *Bosman* [1995] ECR I-04921, para. 142; Case C-262/96, *Sürül* [1999] ECR I-2685, para. 108; Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, para. 57; Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, para. 45; Joined Cases C-453/02 and C-462/02 *Linneweber und Akritidis* [2005] ECR I-1131, para. 42; Case C-228/05, *Stradasfalti Srl* [2006] ECR I-0000, para. 72; Case C- 313/05, *Brzezinski* [2007], ECR I-00513, para. 56; Case C-138/07, *Cobelfret NV* [2009], ECR I-00731, para. 68; Case C-426/07, *Krawczynski*, ECR I-06021, para. 42. Case C-2/09, *Kalinchev* [2010], ECR I-04939, para. 50. Case C-263/11, *Ainars Redlihs* [2012], 19 July 2012, ECLI:EU:C:2012:497, para. 59. Case C-525/11, *Mednis SIA,* [2012] ECLI:EU:C:2012:652, 18 October 2012, para. 42.
[924] Case C-24/86, *Blaizot v Université de Liège* [1988] ECR 379, para. 30; Case C-163/90, *Legros and Others* [1992] ECR I-4625, para. 30; Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, para. 57; Case C- 228/05, *Stradasfalti Srl* [2006] ECR I-0000, para. 72.

First, the "*good faith*" criterion is closer to the legitimate expectations principle than legal certainty. In *Defrene*, the Court took the position that the EC has contributed to uncertainty by failing to act (which was actually the first counter-argument of the EC in *Apple*).[925] In other judgments, the EC's contribution to uncertainty was more 'active', since it sent letters to Belgium.[926] In the State aid law framework, *Société Régie Networks* was one of the cases in which the EC decision contributed to uncertainty. [927]

Second, the "*risk of serious economic repercussions"* entails that undertakings could not have foreseen the effect of the CJEU's interpretation, which *"might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy",[928] and "legal certainty precludes any reopening of the question"[929] and similar.[930]*Such argument was put forward before the GC in Fiat.[931] Luxembourg argued about the potential "*serious economic repercussions*" of recovery orders by reference to recent critiques addresses to the EC in a whitepaper issued bz the US government.[932] The issue was about a loss of confidence among U.S. MNEs which could potentially undermine the attractivity of EU member states. Although the GC did not show particular sensitivity towards this argument,[933] it is important to highlight that it is an argument of legal certainty doctrine (and not legitimate expectations doctrine).[934] However, according to the CJEU, the financial consequences themselves do not justify the limitation in time of the effects of preliminary rulings.[935]

The third criterion, the one of "*exceptional cases*" or the *legal certainty"* criterion, protects member states when legal situations have to be considered uncertain.[936] In assessing legal uncertainty, the CJEU applies a methodology similar to OECD/IMD and CFE, namely it tests legal certainty through the lenses of the related uncertainties based on (i) previous CJEU case law, and (ii) EU law vagueness. As regards the previous CJEU case law, the Court consistently refuses the assumption of uncertainty where there is already well-established case law on a

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925 Case C-43-75, *Defrenne v Sabena* [1976] ECR 455, Para. 73; See also Case C-163/90, *Legros and Others* [1992] ECR I-4625, Paras. 31-33.

926 Case 24/86, Blaizot v Université de Liège [1988] ECR 379, paras. 32 et seq.

927 Case C-333/07, Société Régie Networks [2008] ECR I-10807, para 123.

928 Case C-43-75, Defrenne v Sabena [1976] ECR 455, para. 70.

929 Case C-163/90, Legros and Others [1992] ECR I-4625, Para. 34; Case C-24/86, Blaizot v Université de Liège [1988] ECR 379, Para. 34; Case C-228/05, Stradasfalti Srl [2006] ECR I-0000, para. 76.

930 Case C-437/97, EKW and Wein & Co [2000] ECR I-1157, para. 59; Case C-26, Case C-333/07, Société Régie Networks [2008] ECR I-10807, para 123. Case C-262/96Sürül [1999] ECR I-2685, para. 11.

931 Case T-755/15 *Luxembourg, FCA v Commission* ECLI:EU:T:2019:670 , para. 415.

932 U.S. Department of the Treasury, 'The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings' (2016).

933 The GC argued that "it is clear that the recovery of the aid at issue cannot, as such, have negative economic effects for the Grand Duchy of Luxembourg, since the sums recovered are allocated to its public finances" - Case T-755/15 *Luxembourg, FCA v Commission* ECLI:EU:T:2019:670.

934 Se inter alia, several CJEU case law: Case C-415/93, Bosman [1995] ECR I-04921; Case C-197/94, Société Bautiaa [1996] ECR I-00505, paras. 54 and 55; Case C-294/99, Athinaiki Zythopoiia AE [2001] ECR I-6797, para. 39; Case C-209/03, Dany Bidar [2005] ECR I-2119, Para. 70.

935 Case C-137/94 – Richardson, [1995], ECR I-3407, para. 37; Joined Cases C-367/93 to C-377/93 – Roders et al., [1995], ECR-I-2229, para. 48; Case C-184/99 – Grzelczyk, [2001], ECR I 6193, para 52; See Case C-209/03, Dany Bidar [2005] ECR I-2119 para. 68.

936 Case C-24/86, Blaizot v Université de Liège [1988] ECR 379, para. 34.

"*given certain*" provision of EU law.[937] The current State aid investigation on tax rulings is the first time where the Court covers this specific legal issue.[938] Effectively, one of the precondition that indicates an high level of legal uncertainty is when "*this is the first time that the Court has been called on to interpret the provision at stake*".[939] Therefore, the first test (i.e. previous CJEU case law) has been met. It must be pointed out that beside these extreme scenarios, namely "*first time*" and "*well-established case law*", the legal-uncertainty test is not a very high threshold.[940] Once the related uncertainties are identified, a threshold that triggers the legal certainty principle's protection should be established. The CJEU qualified this threshold as the *"objective uncertainty*" regarding EU provision implications.[941] In this later case, the second criteria should be verified. It must be considered that it is precisely because of the difficulty of TP exercise that MNEs request and need to obtain a certain level of certainty from tax authorities through rulings.[942]The inherent legal uncertainty of TP transactions has been duly highlighted in several documents and reports.[943] Moreover, the EC retroactive application of OECD TP Guidelines in their version of 2010, and 2017 – including the method of Development, Enhancement, Maintenance, Protection, and Exploitation functions (DEMPE) – adds contents that were unforeseeable at the time of the agreement.[944] Therefore, the second condition to assess the legal uncertainty could have been meet, if tested. However, both the GC and EC have not precisely applied and tested the legal uncertainty test to verify its effects. The application of the legal certainty principle's full content is the precondition of identifying the related uncertainties and quantifying the uncertainty threshold before the application of the legal certainty principle. Martin Rodriguez argues that "*throughout EU case law, the [legal*

[937] Case C-61/79, Denkavit Italiana [1980] ECR 1205, Para. 21; Case C-57/93, Vroege [1994] ECR I-04541, Paras. 28-30; Joined Cases C-367/93 to C-377/93, Roders and others [1995] ECR I-02229, Para. 45; Case C-415/93, Bosman [1995] ECR I-04921, Para. 146; Case C-104/98, Johann Buchner [2000] ECR I-3625, Para. 40.

[938] The second time if we consider the Forum 187 case as a valuable case law.

[939] Case C-24/86, Blaizot v Université de Liège [1988] ECR 379, Para. 29 ; Case C-262/96, Sürül [1999] ECR I- 2685, para. 109; Case C-437/97, EKW and Wein & Co [2000] ECR I-1157, para. 58.

[940] M. Lang, Limitation of Temporal Effects of CJEU Judgments: Mission Impossible for Governments of EU Member States, (2013) WU International Taxation Research Paper Series, N.2013, 06, citing Case C-415/93, Bosman [1995] ECR I-04921, para. 143.

[941] Case C-294/99, Athinaiki Zythopoiia AE [2001] ECR I-6797, para. 39. Case C-24/86, Blaizot v Université de Liège [1988] ECR 379para. 28; Case C-309/85 –Barra, [1988], ECR I-355, para. 14; See Case C-184/99 – Grzelczyk, [2001], ECR I 6193para. 53 and Case C-209/03, Dany Bidar [2005] ECR I-2119, para. 69.

[942] A. Giraud & Sylvain Petit, *Tax Rulings and State Aid Qualification: Should Reality Matter*, 2017 EUR. ST. AID L.Q. 233, 241 (2017).

[943] Cf :2.2.3. The complexities of establishing transfer pricing transactions according to the arm's length standard are acknowledged to be manifold: see OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* para. 4.1.34 (OECD 2017), para 1.13. Similarly, scholars support that in transfer pricing transactions not only one outcome is possible: P. WATTEL, « The Cats and the Pigeons: Some General Comments on (TP) Tax Rulings and State Aid After the Starbucks and Fiat Decisions' », in I. Richelle, W. Schön and E. Traversa (eds), *State Aid Law and Business Taxation,* Heidelberg, Springer, 2016, p. 186. In relation to Transfer Pricing, a 2019 survey of over 700 senior tax and transfer pricing executives representing the Americas, Europe and Asia-Pacific revealed that "8 out of 10 executives (79%) describe today's international tax environment as 'uncertain', 40% very much or extremely so": See EY, *How profound change, transparency and controversy are reshaping a critical business function*, Transfer Pricing & Intl. Tax Survey, p. 5 (2019).

[944] Cases T-816/17 and T-318/18, *Grand Duchy of Luxembourg, Amazon EU Sàrl and Amazon.com, Inc. v European Commission,* ECLI:EU:T:2021:252, paras 147-152. The Court also added that "in the contested decision, the Commission referred, however, to the 2010 and 2017 versions of the OECD Guidelines, which amounts to an inappropriate application *ratione temporis* of the reference framework, which should be determined on the basis of the facts and the pricing methods which existed at the time of the adoption of the measures at issue".

certainty] inflationary presence is not accompanied by real effectiveness […]".[945] The improper application of the legal certainty principle's full meaning jeopardises the subsequent steps: identifying the related uncertainties and quantifying the threshold for the principle's protection. The final result is that foreseeability has not been duly assessed and taxpayers have been deprived of the possible legal certainty protection.

Many scholars have tried to develop such as foreseeability test. In line with CJEU's method to assess legal uncertainty, Kyriazis refers to previous CJEU case, namely the *Forum 187* (only one) by pointing out that the CJEU did not need to invent an entirely new EU (non-OECD) arm's length principle.[946] Moreover, the EU arm's length principle was absent from the 2014 EC notice on State aid, which means that the EU arm's length had not even been foreseeable to the EU itself 18 months earlier when it published its Draft Notice.[947] Bal argues that a system of fair taxation, which the EC seeks to establish, cannot be achieved if the fundamental elements of the Rule of Law, such as legal certainty and predictability, are at risk.[948]The novel and unprecedent interpretation of the EC undermines legal certainty provided by their domestic tax administrations. [949] In its pursuit of legitimate objectives (such as the creation of a level-playing field and a system of fair taxation, the EC seems to neglect other fundamental norms stemming from the Rule of Law. [950] US academics have tried to reflect on the same analysis. Caytas has tested the foreseeability of the EC investigation and its novel interpretation by listing all the relevant documents from a temporal perspective.[951] Effectively, only very recently the EC has started investigating tax rulings practices. In 2013, it commenced with Apple in Ireland[952]and in the next three years it has investigated Fiat, Starbucks, the Belgian profit exemption,[953] Amazon and Mc Donalds. On May 19, 2016, the EC published a Notice on the Notion of State aid aiming to clarify its position with regard to tax rulings.[954] On June 3, 2016, the Directorate General for Competition published a working paper on State aid and Tax Rulings.[955] The fact that the EC has started investigating very recently has the inevitable consequence of a lack of CJEU case law, and as we have already discussed, only CJEU case law can be taken as reference when performing a foreseeability analysis. The lack of CJEU case law is an indicator of legal uncertainty. Whilst EC investigations, decisions or guidelines may be relevant for possible legitimate expectations claims, not for legal certainty. Gormsen

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[945] P. M. Rodriguez (n. 283)116.

[946] Kyriazis (n. 782) Chapter 16. See also L. Lovdahl Gormsen, 'Has the Commission Taken Too Big a Bite of the Apple?' (2016) 1(3) European Papers 1137, 1139.

[947] Kyriazis, ibid,323.

[948] Bal (n. 567).

[949] Bal (n. 567).

[950] Bal (n. 567).

[951] Caytas (n. 818).

[952] S. Farrell and H. McDonald, 'Apple Ordered to pay €13 bn After EU Rules Ireland roke State Aid Laws', Guardian, Aug. 30, 2016.

[953] A. Giraud, J-P Gunther and D Tayar, 'Tax Rulings Under EU State Aid Rules After Apple: What is Targeted and What Can Be Done?', (Aug. 31, 2016) WILLKIE FARR & GALLAGHER LLP , https://www.willkie.com/~/media/Files/Publications/2016/08/Tax_rulings_under_EU_state_aid_rules_after_Apple.pdf .

[954] The first document was the Press Release by the European Commission, 'State Aid: Commission Clarifies Scope of EU State Aid Rules to Facilitate Public Investment', (May 19, 2016).

[955] Directorate General Competition, DG Working Paper on State Aid and Tax Rulings (June 3, 2016), https://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf .

and Mifsud-Bonnici have assessed the foreseeability test by clearly separating the principle of legal certainty from the principle of legitimate expectations.[956] In their work, the legal certainty assessment is coherent with CJEU assessment that tests the complexity of EU law, and the "*quasi-legislative activity*" of the CJEU. [957]

In conclusion, the CJEU verifies whether law is foreseeable or not by referring to EU law and its previous judgments. In a consistent manner, scholars have adopted the same reference to evaluate whether the effect of state aid law were foreseeable or not. Other acts of EU institutions are irrelevant since the foreseeability analysis does not require the "precise assurance" standard, which belongs to the legitimate expectations doctrine. Although the legal certainty usually comes into play in regard to the issue of limitation period, the EU principle is not limited to it. Both GC and EC have not precisely assessed the foreseeability test on which the analysis of the legal certainty is based. It must be clarified that according to CJEU, the legal certainty principle should not be applied in an absolute manner, but should be balanced with other principles.[958] The balancing procedure consists of two steps: (i) assessing both principles, (ii) and then balancing them. In order to assess the legal certainty principle, the foreseeability test is the most important step for evaluating any eventual violations. In the current State aid cases, this first assessment is missing. The point is not only about whether legal certainty should prevail or not, but whether the foreseeability requirement is ignored.

3.4.4. The Approach of the EC and the GC to Recovery in the Tax Rulings' Cases: The Compatibility Analysis Does Not Coincide with the Legal Certainty Analysis: The Case of the Negative Decision Without Recovery.

According to Art. 16 of the Council Regulation (EU) 2015/1589, "*where negative decisions are taken in case of unlawful aid, […] the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law*".[959] This provision addresses the "*negative decision without recovery*", which are situations deserving the protection of the general principles of law, such as the legal certainty principle.

The principal argument of this part is that the EU legislator does not examine whether the measure is an aid or not since the measure has been qualified as "*unlawful aid*" already and the "*negative decision*" is taken. Therefore, the assessment of the possible contrariety to the legal

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[956] The authors highlight that "*The principle of legitimate expectations encompasses all situations where legal subjects reasonably rely on the persistence of a legal situation influenced by EU institutions. While one might see a strong connection to the principle of non-retroactivity, the practice of the EU courts seems to put more emphasis on whether or not individuals reasonably relied on circumstances influenced by EU law.*" *See* L. L. Gormsen and C. Mifsud-Bonnici, 'Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advance Pricing Agreements on Tax, (2017) Journal of European Competition Law & Practice', Vol.8, No. 7, pp.23.

[957] See Gormsen and Mifsud-Bonnici ibid. See in the same vein: P. Craig, *EU Administrative Law* (2nd edn, OUP, 2012), 553.

[958] Joined Cases C-42/59 and 49/59 *SNUPAT v High Authority* [1961] ECR 53, 87; Case C-402/11 P, *Jager & Polacek/HABM* [2012]; Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, para 68. See also J. Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust', (2016) European Law Review, Vol. 41, No.41, 275-288.

[959] The Procedural Regulation (n. 472).

certainty principle shall not be confused with any contrariety with State aid law. The general principles of EU law enjoy the status of primary law. This leads to the conclusion that if an EC decision is found contrary to those principles, it would be legally flawed.

It should be clarified that two possible situations may occur (i) the exceptions from the obligation to recover the aid under the EC decision, and (ii) the recovery order *ex-post* Decision that may violate the general principle.[960] The first situation concerns the EC's self-examination when issuing its final decision.[961] This eventuality is not purely theoretical. There are some cases when the EC has self-considered that exceptional circumstances can justify the non-recovery.[962] The second situation concerns an *ex-post* assessment made by the Court as to whether the EC has correctly valued the "*exceptional circumstances*" that deserve the protection of the general principles of EU law.[963] The current State aid cases on TP transactions fall under the second situation, and all applicants (except Starbucks) have pleaded to seek the protection of the legal certainty principle.

In the *Fiat* case, the GC held that the application of the principle of legal certainty may require the retroactive effect of an act to be limited if there are serious economic risks and the interested parties are acting in good faith.[964] The Court spent few words to recognise that both conditions were met in that case.[965] However, the Court recalled that an order for recovery does not constitute the retroactive implementation of an act since removing unlawful aid is the "*logical consequence of a finding that it is unlawful*" and seeks to re-establish the previous situation.[966] According to the settled case-law, in principle, the recovery cannot be deemed disproportionate to the objective pursued by the State aid rules.[967] However, the EC shall not require recovery of an aid when this would be contrary to a general principle of EU Law. The "*logical consequence*" argument should not be used as a self-standing argument irrespective of EU law's general principles. The CJEU does not exclude the application of the general principles[968] and Art. 16 of the Procedural Regulation expressly includes the possible EC preclusion from adopting the recovery. Actually, this preclusion was already acknowledged

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[960] See M. Rzotkiewicz, 'Compatibility of the State Aid Recovery Order with the General Principles of EU Law', (2016) 5 Polish Rev. Int'l & Eur. L. 73.

[961] The EC reached the non-recovery conclusion on its own: see K. Jaros and N. Ritter (n. 411); A. Sinnaeve, Procedure RegardingUnlawful Aid [in:] M. Heidenhain (ed.), 'European State Aid Law', C.H. Beck, Miinchen 2010, p. 642.

[962] EC Decision, *France Télécom*, C (2004)3060, paras 260-261 ; EC Decision Italy, C(2012)9461, para. 200. EC Decision, *G.I.E fiscaux*, C (2006) 6629, para. 194.

[963] Case C-39/94, *Syndicat Français de l'Express International*, ECLI:EU:C:1996:285, para. 4

[964] Case T-755/15, *Luxembourg v Commission*, para 414.

[965] Ibid. It must be pointed out that the GC at para 415 contested the "*serious repercussion*" of the recovery.

[966] Ibid. See also : C-1/09, *Centre d'exportation du livre français*, ECLI:EU:C:2010:136, para. 54; Joined Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia*, para 66; Case C-142/87, *Tubemeuse*, para 66; Case C-310/85 *Deufil v Commission*, ECR 901; Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, para 89; Case C-350/93 *Commission v Italy* [1995] ECR I-699, para 21

[967] Case T-324/00, *Lankhorst-Hohorst*, EU:T:2005:364, para 77 ; Case C-277/00, *Germany v Commission* ECLI:EU:C:2004:238, , para 74 ; Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECRI-4103, para 75 ; Case C-142/87, *Belgium v. Commission (Tubemeuse)* (1990) ECR-959para 66.

[968] Case C-24/95 - *Alcan*, [1997] ECR1-1591(1617), para 25; equally expressive the CFI Judgment in Case T-288/97 - *Regione autonoma Friuli Venezia Giulia*, [2001] ECR11-1169 (1212), paras 107 et seq.; Case T-109/01 - *Fleuren Compost*, para 135.

before the Procedural Regulation entered into force.[969] The assumption that the recovery of State aid is the logical consequence of a definition that is unlawful should not be sufficient to support the fact that the recovery does not violate the principle.[970] Otherwise, expressed in other terms, we would support that the general principles of EU law apply in all cases, except the recovery of an aid since it is the logical consequence of finding it unlawful. Winckler and Laprévote have considered that "S*tate aid prohibition*" is an EU principle, and the CJEU has affirmed that the general principles of legal certainty, equal treatment and protection of legitimate expectations must be weighed against the State aid prohibition.[971] Aside from the argument about the State aid prohibition as an EU principle, the authors, by reviewing selected case law, have argued in favour of a separate evaluation of the "S*tate aid principle*" that shall be combined with other EU general principles.

The legal certainty principle belongs to the general principles of EU Law, and as general, they apply in all are of EU law, State aid law included. The argument to demonstrate the violation of the legal certainty principle cannot be "*the logical consequence of the finding*", since in this case the compatibility test is confused with the legal certainty test. As regards the legitimate expectations protection, the CJEU has introduced the "*diligent businessman*" benchmark to determine whether the notification procedure has been followed.[972] However, as regards the legal certainty protection, the foreseeability requirement remains the primary test to verify the compliance with the principle.

Another overlap between the legal certainty test and the compatibility test appears when the "*objective notion*" of State aid is mentioned. In *Amazon*, for example, within the legitimate protection argument, the EC mentioned that "*State aid is an objective notion so that even if no decisions existed prior to 2015 that declared individual tax rulings as giving rise to State aid, that does not mean that such rulings cannot give rise to State aid*".[973]

The general principles of EU Law, when infringed, prevent the recovery of incompatible State aids. This does not mean that the aid under investigation cannot be qualified as an incompatible (or an unlawful) aid.[974] However, it means the opposite. When a measure has been qualified as incompatible (or unlawful when the EC makes a self-assessment) the unlawful State aid cannot be recovered in case of violation of the legal certainty principle. Therefore, arguments and counterarguments supporting the respective position should be based on the foreseeability requirement rather than State aid compatibility. The clarity of the

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[969] Case C-1/73 *Westzucker*, [1973] ECR723 (729), para 5.; Case C-223/85 *RSV*, [1987] ECR 4617, para 17.

[970] In one of the early CJEU judgements, the CJEU replied that the "*recovery of unlawful aid is the logical consequence of the finding that aid is unlawful*" to the Italian Government that had argued that repayment form the beneficiary should not be sought because it would not serve to restore competition. Case C-305/89, *Italy v Commission* ("Alfa Romeo"), [1991] ECR I-1603, para. 41.

[971] A. Winckler and F.C. Laprévote, 'Reconciling Legal Certainty, Legitimate Expectations, Equal Treatment and the Prohibition of State Aids', (2011) European State Aid Law Quarterly, Vol.10, No.2,321-326.

[972] Case C-24/95 *Alcan*, [1997] ECR1-1591, para25; equally expressive is the CFI Judgment in Case T-288/97 - *Regione autonoma Friuli Venezia Giulia*, [2001] ECR11-1169, paras 107 et seq.; Case T-109/01 - *Fleuren Compost*, ECLI:EU:T:2004:4,, para 135. See also Jaros and N. Ritter (n. 411).

[973] EC Amazon Decision, para 636.

[974] The CJEU has clarified that the Commission cannot request recovery of unlawful aid without first examining the compatibility of the aid with the internal market under the procedure provided for by Article 108(2) TFEU. To that effect, see Judgment of the Court of Justice of 14 February 1990, France v Commission ('Boussac'), C-301/87, ECLI:EU:C:1990:67, paragraphs 9, 10-22.

law is one of the points that should be examined. It seems that both EC and GC circumvent the foreseeability test.

Moreover, the GC assumes that the contested decision's legal rule, namely Art.107 TFEU, is clear and precise by definition.[975] The GC affirmed that this level of clearness and precision of the wording of the Art.107 TFEU cannot trigger the protection of the legal certainty principle. If we assume that Art. 107 TFEU is not misinterpretable because of its clarity, why has the CJEU overthrown GC decisions on several occasions?[976] Why is the four-pronged test built on CJEU case-law? The statement that Art. 107 TFEU's clearness and precision to avoid the legal certainty test appears unconvincing.

At para 408, the GC has stated that "*there is no doubt*" that any state measure that fulfils the condition referred to in Art. 107 TFEU is in principle prohibited and must be made the subject of a recovery order. As we have emphasised at the beginning of this part, there is no doubt that "*when a negative decision is taken*"[977], State aid is qualified as State aid. It is already a State aid since it fulfils the four conditions. However, the legal certainty protection aims to avoid State aid recovery, when its eventual qualification and, therefore, its notification appears unforeseeable. The foreseeable test shall not be disregarded. The legal certainty test does not coincide with the compatibility test (the four-pronged test).
The Court cannot substitute its own assessment of State aid with the EC's assessment, but has to review the legality of the exercise of the EC power, the possible manifest error, or whether the EC has exceeded its discretion.[978] Due to the fact that the review of the compliance with the legal certainty principle is separate from the State aid assessment, the CJEU has full power to evaluate the possible legal certainty protection.

All in all, the protection from recovery - provided by the EU Regulations and CJEU jurisprudence - does not call into the question whether a measure is State aid or not, since the measure has been already qualified as State aid. However, these State aid qualifications that were unforeseeable deserve the protection from the recovery based on the legal certainty principle. The foreseeability test is the assessment that should be carried on verifying whether those measures deserve the legal certainty protection. Therefore, the foreseeability test does not coincide with the compatibility test.

3.4.5. Partial Conclusion

The legal certainty principle is a general principle of EU law, which states that "*law should be certain, so that it can be easily enforced and so that people can know where they stand*".[979] Within the State

975 Case T-755/15 Luxembourg v Commission, para 406.
976 See, *inter alia*, Joined Cases C-106/09 P and C-107/09 P *Commission v Government of Gibraltar* ECLI:EU:C:2011:732
977 Art. 16 Procedural Regulation. See also Case T-755/15 *Luxembourg v Commission*.
978 Case C-110/03 Belgium v Commission [2005] ECR I-02801, para 68; Case C-288/96 *Germany v Commission*, para 26 and Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, para 64.
979 Grote (n. 189)271. Lord Mance (n. 189); See also Fenwick and Wrbka (n. 151).

aid law framework, the legal certainty principle plays a fundamental role in the validity of the EC's decisions to order recovery. In particular, the legal certainty principle protects taxpayers from the EC's recovery orders, when the State aid law's legal effects have been considered unforeseeable.[980] In this case, legal certainty can be pursued on an *ex-post* basis, because it acts as a guiding principle when judges are required to evaluate (*ex-post*) whether the level of uncertainty goes beyond the acceptable level to the extent that taxpayers cannot foresee the legal consequences of their actions.

In the recent EC investigations on tax rulings, taxpayers claim the protection from recovery based on the legal certainty principle with unsuccessful results. Both the EC and the GC have deprived taxpayers not only of the *ex-ante* legal certainty provided by the domestic tax rulings, but also of the *ex-post* protection from the recovery based on the legal certainty principle. First, the General Court and the EC have interpreted narrowly the legal certainty principle and they have reduced it to the legitimate expectations principle (one of its subprinciples). Secondly, the test to assess the foreseeability of the effects of the law (which is the basis to assess the legal certainty protection) has been confused with the State aid compatibility test (which is the basis for evaluating whether State aid is compatible with the internal market).

As regards the confusion with the legitimate expectations principle, the GC and EC's diverted legal certainty's argument to legitimate expectations' argument, which are most favourable to deny the protection. Domestic tax rulings cannot provide legitimate expectations since only the "*precise, unconditional assurance"* of the EU institutions may trigger a possible protection.[981] On the contrary, the protection from recovery based on the legal certainty principle does not require the "*precise assurance*" condition or other reference to EU acts. According to the CJEU, the legal certainty principle requires a test to verify the good faith and foreseeability requirement, and additionally, but not essentially, the possible serious economic repercussions. The CJEU tests the foreseeability of the effects of law only considering the EU law, and its case law. The EC decisions or other acts are disregarded, since they do not bind the CJEU. In all the pending case before the GC, both the GC and the EC have disregarded the foreseeability test, therefore taxpayers are deprived of a possible protection based on legal certainty.

As regards the confusion with the state compatibility test, the GC and the EC have assessed the compatibility of the investigated State aid, which is the basis for evaluating whether State aid is compatible with the internal market, rather than assessing the foreseeability of the effects of the law, which is the basis to verify possible protection from recovery based on the legal certainty principle. The foreseeability test to evaluate a possible protection from recovery based on the legal certainty principle does not question whether the investigated position is

[980] Cleynenbreugel (n. 783). According to the Art. 16 (1) of Regulation 2015/1589 "*the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union Law*".

[981] Joined Cases T-50/06 T-56/06 and T-60/06 *RENV II, Ireland v Commission, France v Commission, and Italy v Commission*. ECLI:EU:T:2012:134, para. 214.

State aid since the legal position has been qualified as State aid already. Therefore, the assessment of the possible contrariety to the legal certainty principle shall not be confused with the contrariety with State aid law. As the general principles of EU law enjoy the status of primary law, if an EC decision is found contrary to those principles, it would be legally flawed. This means also that the foreseeability test shall be assessed.

3.5. Chapter Conclusion

In the ongoing State aid investigations regarding tax rulings, there is a lack of legal certainty in both ex-ante and ex-post forms of protection. Domestic tax rulings cannot provide ex-ante protection for several reasons. Firstly, domestic tax rulings do not meet the criteria for legitimate expectations, as only a decision from the EC can provide the necessary "precise assurances". Additionally, some fiscal State aid cases have inherent ex-post elements that cannot be predicted ex-ante. For instance, the arm's length standards are determined ex-post, after the taxpayer's actions, and the counterfactual assessment of the arm's length principle cannot be foreseen ex-ante. The EC is also forced to examine ex-post those State aids that have not been notified for review, which are considered "unlawful State aid".

The ex-post investigations have become necessary due to the unique circumstances of each case. All of these cases are considered unlawful, as the member states have failed to notify the tax rulings through the proper notification procedure. These tax rulings are considered "new aids" and, according to the State aid Procedural Regulation, must not be implemented until they have been reviewed (stand-still obligations). The EC became aware of these rulings through other investigations, such as those conducted by the US government, or through claims made by other interested parties. As a result, the EC may not have knowledge of all possible violations of EU State aid law.

Although there are no legal instruments that provide certainty in advance under State aid law, taxpayer and member states can be can claim ex-post protection provided by the principle of legal certainty. In this context, ex-post protection plays a crucial role in the State aid recovery process. In accordance with the State aid legal framework and the jurisprudence of the CJEU, the principle of legal certainty protects taxpayers from the EC's recovery order when the legal effects of State aid law were considered unforeseeable. In such cases, legal certainty can be pursued ex-post, as it serves as a guiding principle when judges must evaluate (ex-post) whether the level of legal uncertainty goes beyond an acceptable level, making it impossible for taxpayers to foresee the legal consequences of their actions.

While it is undisputed that legal certainty should provide some level of protection in situations of uncertainty, the overuse of the concept does not necessarily lead to real effectiveness, clear meaning, or a distinguishable function. [982]

In recent EC investigations of tax rulings, taxpayers were denied both the ex-ante legal certainty provided by domestic tax rulings and the ex-post protection from recovery based on the legal certainty principle. Both the EC and the GC have rejected the legal certainty protection from recovery, using arguments that do not align with the claims made by taxpayers and member states. Firstly, the GC and the EC have not fully taken into account the principle of legal certainty and have instead limited it to the principle of legitimate expectations. Secondly, the test used to evaluate the foreseeability of the effect of law (which is used to determine legal certainty protection) has been wrongly conflated with the State aid compatibility test (which is used to determine if a particular State aid is compatible with the internal market).

We have argued that there has been a mixing up of the legal certainty principle and the legitimate expectations principle in recent EC investigations on tax rulings. Both taxpayers and multinational enterprises have claimed protection under both principles, but the GC and the EC have selectively focused on the legitimate expectations principle, which is more favorable for denying protection. Domestic tax rulings cannot provide legitimate expectations as only the EU institutions can provide the required "precise, unconditional assurance".[983] Even other similar EC previous decisions, such as the *Groepsrentebox* Decision, cannot provide legitimate expectations since the interpretation of the certain provisions on which this decision is based are slightly different than those on which other previous decision are based, therefore the EC approach is not innovative;[984] even in case of identical situations, or innovative approach, the EC is not bound by its previous decision making practice, therefore, those decisions cannot provide legitimate expectations;[985] In cases of legal uncertainty, the overriding public interest in recovery may prevent the adoption of transitional measures.

However, protection from recovery based on the legal certainty principle does not require reference to EU acts and does not have the "*precise assurance*" requirement. According to the CJEU, the legal certainty principle requires a test for good faith and foreseeability and, additionally, but not necessarily, the potential for serious economic repercussions. The CJEU assesses the foreseeability of the effects of the law by examining EU law and previous CJEU judgments. EC decisions or other acts are disregarded as they do not bind the CJEU. In the current investigation, the foreseeability test has been ignored, depriving taxpayers of its protection.

[982] See the severe perspective in J. Van Meerbeeck (n. 291)19-20.
[983] Joined Cases T-50/06 T-56/06 and T-60/06 *RENV II, Ireland v Commission, France v Commission, and Italy v Commission*. ECLI:EU:T:2012:134, para. 214.
[984] Case C-138/09, *Todaro Nunziatina &C.* ECLI:EU:C:2010:291, para 21.
[985] Ibid.

As regards the confusion with the state compatibility test, the GC and the EC have assessed the compatibility of the investigated State aid, which is the basis for evaluating whether State aid is compatible with the internal market, rather than assessing the foreseeability of the effects of the law, which is the basis to verify a possible protection from recovery based on the legal certainty principle. The main argument in favour of the GC and EC' approach is based on those judgments where the CJEU recalled that an order for recovery does not constitute the retroactive implementation of an act since removing unlawful aid is the "*logical consequence of a finding that it is unlawful*" and seeks to re-establish the previous situation.[986] Moreover, the recovery of such aid, for the purpose of restoring the previously existing situation, cannot *"in principle"* be regarded as disproportionate to the objectives of the provisions of the EU Treaty relating to State aid.[987]

However, Art. 16 of the Council Regulation (EU) 2015/1589 requires that "*where negative decisions are taken in case of unlawful aid, […] the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law*". This particular exception can be defined as "*negative decision without recovery*", which are measures that have been already classified as State aid (incompatible since they are "*negative decision*"), however, they deserve the protection of the legal certainty principle since they were unforeseeable. The EU legislator (and CJEU jurisprudence before the Regulation was enacted) does not examine whether the measure is an aid or not, since the measure has been qualified the "*negative decision*" is taken. Moreover, the CJEU specifies that the recovery of such aid (for the purpose of restoring the previously existing situation) cannot *"in principle"* be regarded as disproportionate to the objectives of the provisions of the EU Treaty. "*In principle*" means that there are certain circumstances where the applicant must be able to prove that the result of the comparison between the public interest in the recovery of the aid and the private interest (the protection of the general principles) is favorable to the beneficiary opposing the recovery.[988] Otherwise the State aid interest would prevail in all circumstances over the private interest of being protected against unforeseeable State aid recovery. Therefore, the assessment of the possible contrariety to the legal certainty principle shall not be confused with the contrariety with State aid law. The general principles of EU law enjoy the status of primary law. This leads to the conclusion that if an EC decision is found contrary to these principles, it would be legally flawed. This means also that the foreseeability test shall be assessed, which is not the case in reality.
It seems that under State aid law the legal certainty principle becomes a concept that falls between the words "*it must be borne in mind that*" and "*however*".[989] Between the ability "*to ascertain*

[986] Case T-755/15 *Luxembourg v Commission*, para 414. Case C-1/09, *Centre d'exportation du livre français*, ECLI:EU:C:2010:136 (hereinafter 'CELF II'), para. 54; Joined cases C-328/99 and C-399/00, Italy and SIM 2 Multimedia, paragraph 66; Case C-142/87, *Tubemeuse*, para 66; Case C-310/85 *Deufil v Commission*, ECR 901; Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, para 89; Case C-350/93 *Commission v Italy* [1995] ECR I-699, para 21.
[987] Case C-91/01, *Italy v. Commission*, ECLI:EU: C:2004:244, para 54.
[988] Case C-183/95 *Affish BV*, , EU:C:1997:373, para. 57.
[989] See, *inter alia*, Case C-110/03 *Belgium v Commission* [2005] ECR I-02801, paras 30 and 31.

[rights and obligations] unequivocally", and a "*degree of uncertainty […] is inherent in that rule*", the legal certainty principle has been deprived of effectiveness. [990]

The general principles of EU Law, as general, apply in all areas of EU Law, State aid included. In case of "*unforeseeable law effect*" it is impossible for member states to notify to the EC, and this impossibility shall be protected or at least should be evaluated and then balanced by reducing the recovery's effect. Moreover, the specific context of tax rulings that intrinsically support the legal certainty and the legitimate expectations principle may justify the successful invocation of the EU law principle to mitigate or reduce the retroactive judgment effects. In other terms, the protection of the State aid recovery shall be possible.

The CJEU jurisprudence has not consistently shown a strict application of the legal certainty protection. According to the CJEU's case law, the application of EU law rules must be "*foreseeable by those subject to them*" and said rules must "*enable those concerned to know precisely the extent of the obligations imposed on them" and these persons need to be able "to ascertain unequivocally what their rights and obligations are and take steps accordingly*".[991] Any doubts as to the "*language of the law*" must be interpreted in favor of the individual.[992] That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them".[993] This high bar does not correspond to what has been applied in the case at stake.

In conclusion, the *ex-post* protection from State aid recovery based on the legal certainty principle shall be possible. The legal certainty principle does not coincide with the legitimate expectations principle, does not have the same doctrine and it should not be limited to it. Finally, when judges assess the possible unforeseeable effect of law, in order to reduce or annul the State aid recovery, the legal certainty test is based mainly on testing the foreseeability of the effect of the law, rather than test the compatibility of the measures.

[990] J.P. Bours, *Sécurité juridique et Droit Fiscal, in Les Cahiers de l'Institut d'Études sur la Justice, n. 4, Sécurité juridique et fiscalité,* (Bruyant, 2003), 63.
[991] Case C-201/08 *Plantanol* [2009] EU:C:2009:539, para 46 ; Case C-345/06 *Heinrich* [2009] EU:C:2009:140, para 44.
[992]Case C-17/03, *Vereniging voor Energie, Milieu en Water and Others v. Directeur van de Dienst uitvoering en toezicht energie*, ECLI:EU:C:2005: 518.
[993] Case C-63/93 *Duff and Others* [1996] ECR I-569, para 20.

4. Risks, Uncertainty and Dispute Avoidance Mechanism: Fiscal State Aid Hallmarks

4.1. Introduction

In the previous Chapter, legal uncertainty has been discussed from an *ex-post* perspective. Taxpayers, such as Apple, Amazon and the others MNEs investigated by the EC, can seek protection from the CJEU, as the CJEU applies a specific methodology to assess the level of law uncertainty required for granting protection on the basis of the legal certainty principle. Although the legal certainty principle is currently a viable solution for the EU taxpayers, it is neither effective nor applied. The principle of legal certainty, as a remedial measure, can only be granted by courts, thus its efficacy is limited. Obtaining certainty through a final court judgment often takes more than ten years from the tax position, making it an ineffective solution for investments.

The IMF and the OECD have recommended dispute avoidance mechanisms (such as APAs) as a more effective legal tool to provide early certainty, which is considered optimal for investments. The EU JTPF suggested the same solution by proposing dispute avoidance mechanisms as the most suitable solution for early certainty.

However, as we will investigate in this Chapter, under the State aid law framework, APAs not only are not able to prevent disputes, but also may increase the risk of State aid disputes. The reason behind this hypothesis is that, although fiscal State aid is a tax advantage, it should be considered as an independent risk factor (risk of being disputed). Therefore, an instrument such as 'dispute avoidance mechanism', which is able to reduce the risk of tax disputes, paradoxically increases the risk of state aid disputes, even if fiscal state aid (i.e. always tax).

Provided that APAs are not the suitable to provide legal certainty, we would then propose a dispute avoidance mechanism to reduce the risk of State aid disputes via taking into consideration State aid risks. The subsequent analysis aims to assess the risk of State aid disputes with the limitation of not pursuing the perfect legal certainty, which means by definition the absence of risks. The ranking activity of risk (with its composition of impact and the probability of occurrence) represents a solution to set a scale for the level of compliance rather than a dualistic expression of certainty or uncertainty (compliant, not compliant). Hayek accepts the quantifiable notion of gradable legal certainty.[994] In this respect, the risk approach gives us more information about uncertainty and its effect on our predictability. Establishing a different degree of compliance is beneficial within TP

[994]F.A. Hayek, *The Constitution of Liberty*, (Routledge & Kegan Paul, 1960), 208. He expressly cites the measure of certainty "*by the case that do not reach the court, rather than the others*".

transactions since the transactions might be compliant with the arm's length standard to a degree of acceptable results rather than a sole predetermined result.[995]

The introduction of risk assessment within State aid control will benefit all stakeholders. First, the EC can improve its capability to select "*less and better-targeted aid*", which is one of the aims of its State aid action plan;[996] second, taxpayers can improve their capacity to reduce State aid disputes; and third, tax administrations can submit better-targeted notifications.

This Chapter is divided into five sections. The introduction lists the objectives and limits of the Chapter. The second section introduces how dispute avoidance mechanisms are conceived to improve early certainty. It then clarifies how legal certainty is intended from an *ex-post* to an *ex-ante* perspective, and it highlights the lack of dispute avoidance mechanisms within the current State aid law framework. The third section compares how legal uncertainty and legal risks are dealt with by different disciplines. The fourth section introduces the concept of fiscal *State aid hallmark* as a State aid risk indicator. The fifth section concludes the Chapter.

4.2. Dispute avoidance mechanism: legal instruments to provide early certainty

4.2.1. Introduction

In the previous Chapters, we discussed the difficulty, or quasi-impossibility, of obtaining *ex post* judicial protection by relying on the legal certainty principle. This protection is a current available *ex post* (i.e. a protection granted by judges after the decision to invest is made). However, in their tax certainty agenda, the OECD/G20 state that *ex-ante* certainty is at the top of their list of political priorities, considering it extremely beneficial for investments. The legal certainty principle, in its generality, is not limited to an *ex-post* protection but covers both *ex-ante* and *ex-post*. Moreover, it is more efficient to avoid the cost of disputes. In this regard, dispute avoidance mechanisms are one of the legal instruments aiming to improve legal certainty on an *ex-ante* basis for avoiding disputes. They reconcile the legal certainty principle with the tax certainty aim as expressed by the OECD/G20 in their tax certainty agenda.

In the current State aid law framework, a dispute avoidance mechanism is missing, especially with regard to TP transactions facing the risk of State aid investigation. Taxpayers can only rely on a "*hard to obtain*" *ex-post* protection that inevitably requires a dispute, as this kind of

[995] OECD Transfer Pricing Guidelines 2022, OECD Publishing, Paris, 164: "*because transfer pricing is not an exact science, there will also be many occasions when the application of the most appropriate method or methods produces a range of figures all of which are relatively equally reliable*", pA.7.1., or "*It is also possible that the different points in a range represent the fact that independent enterprises engaged in comparable transactions under comparable circumstances may not establish exactly the same price for the transaction*."

[996] Commission's State aid Action Plan (SAAP) of 2005 where the EC defines substantive "key priorities". See *also, M. Blauberger,* 'State Aid Control from a Political Science Perspective'*, in E. Szyszczak(ed), Research Handbook on European State Aid Law*, (Edward Elgar Publishing, 2011), 698.

legal certainty protection can be provided by judges in the context of a dispute (litigation in this case).

Taking all into consideration, this section represents a bridge between the *ex-post* certainty provided by the legal certainty principle via judicial decisions and the *ex-ante* protection provided by dispute avoidance mechanisms. In particular, the following issues will be discussed: (i) the difference between the *ex-ante* certainty provided by dispute avoidance mechanisms and the *ex-post* protection provided by the legal certainty principle, and (iii) the lack of dispute avoidance mechanisms within the EU State aid legal framework.

4.2.2. Legal certainty: from the ex-post to the ex-ante protection of dispute avoidance mechanisms

Within EU law, particularly within tax law, the enactment and implementation of legal instruments to improve legal certainty has been considered a pillar, especially for tax positions that are generally considered as uncertain, such as TP transactions.[997] EU institutions have enacted and implemented several legal instruments to improve legal certainty within the EU legal framework. For example, the Arbitration Convention and the related JTPF[998] reports have been positive contributions to implement measures that can improve legal certainty.[999] However, these legal instruments, like judicial protection based on the legal certainty principle, represent an *ex-post* form of providing certainty. Moreover, their effectiveness in providing legal certainty has been questioned. Member states' obligation to resolve TP disputes is not always enforced, and there is often no recourse available to the taxpayer in case the mechanism is not applied properly, or the procedure is prolonged or blocked. [1000] The resolution of disputes and the related timeline is also unpredictable in certain cases.[1001]

In order to improve dispute resolution, the EU took an important step forward towards making dispute resolution procedure more effective and efficient. On October 10, 2017, the Council adopted the Directive on Tax Dispute Resolution Mechanisms in the European

[997] European Commission's Directorate-General for Taxation and Customs Union, 'Tax Uncertainty: Economic Evidence and Policy Responses', (2017) Taxation Paper n. 67/2017.

[998] The EU Joint Transfer Pricing Forum (JTPF) is a forum composed of member states and business representatives who assists and advises the European Commission on transfer pricing tax matters. See https://taxation-customs.ec.europa.eu/joint-transfer-pricing-forum_en.

[999] EU Arbitration Convention (Ec) 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the adjustment of Profits of Associated Enterprises, OJ L 225 (1990). The EU Arbitration Convention establishes a procedure to resolve disputes where double taxation occurs between enterprises of different Member States as a result of an upward adjustment of profits of an enterprise of one Member State.

[1000] For cases where the access is denied or procedures are blocked or delayed, see Commission staff working document impact assessment accompanying the document Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union SWD/2016/0343 final – 2016/0338(CNS).

[1001] I. Verlinden et al., 'Transfer Pricing Developments in the European Union, in Transfer Pricing Developments Around the World', in M. Lang, A. Stock and R. Petruzzi (eds), TITLE (Wolters Kluwer, 2018), 71.

Union.[1002] This Directive builds upon the EU Arbitration Convention and covers economic double taxation with regard TP issues.[1003]Although the enacted improvements lead to a clearer timeline, as well as the mandatory and binding arbitration, the Directive does not offer a solution for *ex-ante* certainty as it is limited to *ex-post* disputes.

Indeed, dispute resolution mechanisms are distinct from dispute avoidance mechanisms, as only the latter focus on providing *ex-ante* certainty. Art.1 of the Directive on Tax Dispute Resolution Mechanisms limits the scope to disputes "*when they arise.*" Moreover, the Directive refers to actions "*resulting in or that will result in question of dispute.*"[1004] Both dispute avoidance mechanisms and the judicial protection based on the legal certainty principle act on an *ex-post* basis and require a dispute to eventually provide legal certainty. In contrast, dispute avoidance mechanisms, such as APAs, aim to provide *ex-ante* certainty and prevent disputes.

Dispute avoidance mechanisms do not (and cannot) provide the absolute certainty of not being subject to litigation, but they aim at reducing the likelihood of a dispute. For example, the Arbitration Convention refers to cases when an action results in or is "*likely to result in double taxation.*"[1005] The term "likely" indicates the lack of absolute certainty. In the next section, we disclose the use of probability terminology in the legal domain (i.e. likely, not likely, certain). When legislators, enforcement authorities are dealing with *ex-ante* situations – such as to find future or situations that are more likely to trigger disputes - they are forced to deal with uncertainty and the related likelihood that certain law effects arise. In this regard, all dispute avoidance mechanisms are based on selected measures that can likely being considered as non-compliant.

The OECD proposes dispute avoidance mechanisms as the most effective legal instrument to promote tax certainty and reduce tax disputes.[1006] The most well-known dispute avoidance mechanisms include (i) APAs, (ii) join audit, (iii) simultaneous tax examination, and (iv) safe harbors, (v) exchange of information. As discussed, they must be distinct from the dispute resolution instruments (such as MAP) since dispute resolution aims to address tax certainty of situations when international taxation disputes have already occurred, while dispute avoidance mechanisms aim at anticipating the possible confrontational situation to resolve issues before they arise.[1007]

[1002] Council Directive on Tax Dispute Resolution Mechanisms in the European Union, OJ L 265.
[1003] I. Verlinden et al., (n. 1002)72.
[1004] Council Directive on Tax Dispute Resolution Mechanisms in the European Union, OJ L 265. I. Verlinden et al., (N. 1002),72.
[1005] Art. 6, EU Arbitration Convention (Ec) 90/436/EEC of 23 July 1990.
[1006] OECD (2019), *OECD Secretary-General Report G20 Finance Ministers and Central Bank Governors - June 2019*, OECD, Paris, 2019, p.92. See also, S. Buriak, Administrative Approaches to Avoiding/Minimizing Transfer Pricing Disputes', in R. Petruzzi, G. Cottani, M. Lang, *Fundamental of Transfer Pricing, A practical guide*, (Wolters Kluwer, 2019), 161.
[1007] Cf: 2.2.4.

Similarly, the EU TP forum proposes the following legal instruments (i.e. dispute avoidance mechanisms) as potential solutions to reduce the likelihood of disputes and improve the *status quo*:

a) Tax rulings (APAs).
b) Exchange of information;
c) Simultaneous tax examinations;
d) Voluntary or mandatory prior consultation or agreement.[1008]

This proposal by the EU TP Forum to enhance dispute avoidance mechanisms does not address the risk of State aid disputes. It is unclear whether this proposal assumes that by reducing the risk of tax disputes (reducing the risk of possible tax advantage), those instruments also reduce the risk of fiscal state aid disputes (reducing the risk of State aid advantage). In this thesis, we will argue that the risk of tax advantages and risk of fiscal State aid advantages are different and, therefore, require distinct dispute avoidance mechanisms.

The *ex-post* nature of State aid investigations on TP transactions and the lack of the protection provided by the legal certainty principle highlights the current ineffectiveness of *ex-post* legal certainty protection. In this case, the purpose of the legal certainty principle is to protect taxpayers when they are unable to foresee the effect of law. Judges assess, on an *ex-post* basis, whether at the time when tax position was assumed, taxpayers were able to foresee the effect of law. Essentially, this is an *ex-post* assessment of the *ex-ante* taxpayer's ability to foresee the effect of law. On the contrary, dispute avoidance mechanisms aim at identifying future scenarios that may present a significant likelihood of triggering future disputes. In other words, they aim to detect the relevant legal uncertainties than can lead to disputes.

4.2.3. Lack of dispute avoidance mechanisms within State aid law framework: A taxpayers' impossibility to obtain advance certainty

Under the State aid law framework, a possibility for taxpayers to obtain legal certainty may be to directly notify the EC. The purpose would be to obtain an EC Decision, triggering the certainty provided by the legitimate expectations principle. However, within the current EU legal framework, a diligent taxpayer facing doubts about the compliance of its tax position has

[1008] Communication from the Commission to the Council, the European Parliament, and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within EU, SEC (2007) 246, Com (2007) 71 final, 2007. See also, A. Brodzka, Exchange of Information on Cross-Border Tax Rulings As the European anti-Tax Avoidance Measure, Vision 2025: Education Excellence and Management of Innovations through Sustainable Economic Competitive Advantage, 2020, pp-45-46.

no formal access to the EC to obtain a decision.[1009] Taxpayers may indirectly apply for the "*compliant procedure*" reserved for interested parties, as they can be qualified as such.[1010] However, the "*complaint procedure*" in these case might be deemed an abuse of law, as it was initially designed to protect competitors.[1011] Moreover, a direct notification may entail other concerns. Firstly, the taxpayer cannot notify a hypothetical state measure. The existence of a state measure is one of the pre-conditions necessary to be qualified as State aid. Therefore, the consequence would be that for that hypothetical measure to be qualified as compliant with State aid because of its lack of existence. Secondly, the risk of additional eighteen months required for the formal investigation procedure runs against the need for early certainty. Lastly, a direct submission may compromise the trust between taxpayers and tax administrations, a crucial element for improving compliance and simplifying the analysis.[1012] Therefore, the direct notification option raises several legal and practical concerns, suggesting that it might not be the best approach when seeking legal certainty.

Luja identifies other possibilities to obtain certainty, with one of them already available.[1013] The existing remedy involves asking a national court to determine whether a measure qualifies as State aid. While a viable solution, this remedy can create several concerns. First, under EU law, the national court cannot confirm compliance with the internal market rules, only non-compliance.[1014]The EC holds the exclusive role in validating compliance of a state measure with State aid law. Second, in case of non-compliance, it is questionable whether national courts can order member states to make a notification based on a request from the beneficiary.[1015] Lastly, as the ultimate goal of dispute avoidance mechanisms (such as notification, and APAs) is to avoid disputes and obtain certainty, engaging in disputes to avoid disputes may lack coherence.

Luja suggests three additional possibilities to obtain legal certainty. Firstly, the EC may introduce an administrative procedure allowing a fiscal aid recipient to directly submit to the EC. However, this proposal does not address the hypothetical measure issue discussed earlier and may not effectively limits the amount of information and workload for the EC. In 2021, the GC held that there is no procedure for "*self-notification*" or "*quasi-notification*" and rejected

[1009] As discussed in the first Chapter, the EC Decision do not contribute to the legal certainty because the EC cannot clarify state aid law due to the exclusivity of the CJEU (which is the only EU body entitled to interpret EU law). However, the EC Decision can provide legitimate expectation.
[1010] The Art. 1(h) of the Council Regulation (EC) 659/1999 includes among all interest parties the "*the beneficiary of the aid*".
[1011] R. H.C. Luja, 'Legal Protection of the Diligent Recipient of Fiscal State Aid', in P. Pistone (ed) Legal *Remedies in EU Tax Law*, (IBFD, 2009), 258.
[1012] OECD (2019) Forum on Tax Administration (FTA) Report on Joint Audit 2019-enhancing tax co-operation and improving tax certainty. See also, OECD 2010, Forum on Tax Administration: SME compliance group, Understanding and Influencing Taxpayer's Compliance Behaviour, 2010, pp.345-346.
[1013] The fourth solution is "*doing nothing*" to let politics take its course.
[1014] See Notice on Cooperation between national courts and the Commission in the State aid field, OJ 1995 C 312/07, and Notice of the Enforcement of State Aid Law by National Courts, OJ 2009 C 85/1. See also, C. Hii Panayi, *European Union Corporate Tax Law*, (CUP2013), 147.
[1015] In Luja's Opinion, the national courts cannot order a member state to notify. See R. H.C. Luja, 'Legal Protection of the Diligent Recipient of Fiscal State Aid', in P. Pistone (ed) Legal *Remedies in EU Tax Law*, (IBFD, 2009), 258.

in two cases an appeal by a recipient of illegal State aid that asked the EC to declare the aid's compatibility with the internal market rules.[1016] The other possibilities fall under the dispute framework, the first through the CJEU, and the second through the national courts. Both of them present the same problems. The State aid assessment is within exclusive competence of the EC and, as we have already emphasized, disputing to avoid dispute does not appear coherent.

4.2.4. Partial conclusion

The dispute avoidance mechanisms are legal tools that help reconcile the goal of the OECD/G20 to improve tax certainty for investments and safeguard taxpayers' rights in accordance with the principle of legal certainty. The existing EU State Aid legal framework lacks effective dispute avoidance mechanisms, particularly for taxpayers involved in TP transactions. The absence of such mechanisms denies taxpayers the opportunity to achieve ex-ante certainty and avoid disputes with the EC. The legal tools available to taxpayers are limited, and the principle of legitimate expectations, which could provide protection, can only be invoked in response to direct actions by the EC. This gap in the State aid law framework results in a lack of legal instruments to reduce legal uncertainty and mitigate the risk of disputes for taxpayers.

4.3. Dispute avoidance mechanisms: legal instruments to reduce the risk of dispute

4.3.1. Introduction

Dispute avoidance mechanisms have been the OECD's suggested solution to reduce legal uncertainty and mitigate (or avoid) the risk of disputes.[1017] Since one of the aims of this thesis is to propose a legal instrument to reduce (or avoid) the risk of State aid disputes for taxpayers involved in TP transactions in EU, it is crucial to understand what does risk and uncertainty mean, how (legal) risk and the risk of disputes is correlated to (legal) uncertainty, and how

[1016] T-678/20, Solar *Electric and others vs European Commission, ECLI:EU:T:2021:780; T-623/20, Sun West and others v European* Commission, ECLI:EU:T:2021:869. See also, P. Nicolaides, 'Illegal Aid Cannot be Regularised a Posterior', State Aid Uncovered blog, 28 December 2021.
[1017] OECD (2019), *OECD Secretary-General Report G20 Finance Ministers and Central Bank Governors - June 2019*, OECD, Paris, 2019, 92.

risk and uncertainty are meant within the legal framework, especially within the tax law framework.

This sub-Chapter is divided into the following sections: the first section is the introduction that aims at placing this sub-Chapter in the context of the whole thesis. The second section highlights the difference between risk and uncertainty. The third section clarifies how legal risks are intended in the EU legal framework and what is the relation with legal uncertainty. The fourth section clarifies how the concept of risk has been adopted under several Tax Law and EU measures. This sub-Chapter will be important for understanding how the risk should be used for fiscal State aid law dispute avoidance mechanisms.

4.3.2. Difference between risk and uncertainty

As discussed in the first Chapter, legal certainty is a well-known principle that requires judges to protect taxpayers when a certain degree of uncertainty has the effect of making laws unforeseeable.[1018] Amazon, Apple, and other investigated taxpayers have argued that the EC's alleged fiscal State aid was unforeseeable, and they did not considered this "*risk*".[1019] According to Amazon, Apple and others' pleads, the "*degree of uncertainty*" was significant at the point they could not foresee the effect of the law upfront. Still, they did not even consider the "risk" of being investigated for having violated EU State aid law. It is evident from the words used by the taxpayers that risk is understood as a level of uncertainty. Itis evident whether risk and uncertainty can be used interchangeably. The literature that highlights the constant state of tax law uncertainty does actually refer to uncertainty or does it refer to risks?[1020]Does legal certainty mean an absence of uncertainties, or does it mean an absence of risks? Are risk and uncertainty interchangeable terms?

Risk and uncertainty are often used interchangeably, although, as we will see, they are considered as two distinct concepts.[1021] Legal theorists argue that the urge to attenuate legal uncertainty is not misplaced.[1022] This attenuation should be preceded by understanding the meaning of uncertainty (and legal uncertainty), and whether there is a model against which we assert as a deviation from the required legal certainty. Within this framework of legal

[1018] M. Fenwich and S. Wrbka, *Legal Certainty in a Contemporary Context*, (Springer 2016).89, 90.
[1019] See for example the U.S. Dept't of the Treasury, the European Commission's recent state aid investigations of transfer pricing rulings 56 (2016), para 14.
[1020]V. Chand, 'Achieving Certainty in an Uncertain Profit Allocation Environment', (2019) Intertax Volume 47, Issue 12, pg?; P. Valente, 'Advance Pricing Arrangements: Optimal tool-Optimal Framework?', (2020) Intertax, Volume 48, Issue 1,67-73; W. D. Terando and J. M. Kurtenbach, *The impact of tax law uncertainty on the development of the Sarbanes-Oxley auditor independence rules with regard to tax shelters*, (Elsevier, 2009), 118-124; A. Bal, 'Tax Rulings: Uncertain Certainty' in M. Cotrut and others, *Tax Incentives in the BEPS Era*, (IBFD, 2010),231.
[1021] F.H. Knight, *Risk, Uncertainty and Profit*, (Hart, Schaffner and Marx, 1921); R. Langlois, 'Risk and uncertainty', in P.J. Boettke, (Ed) *The Elgar Companion to Austrian Economics*, (Elgar 1994).
[1022] J. M. Farago, 'Intractable cases: The role of uncertainty in the concept of law', (1980) 55 (2) N.Y.U.L. L. Rev. 195.

uncertainty, we argue that the risk concept sheds light on distinguishing different forms of uncertainties and establishing a degree of (legal) certainty. The identification of the riskier transactions will be the output of this study that aims at reducing fiscal State aid disputes.

The term "*risk*" is profusely cited in the laws, regulations, guidelines, case-law, and scientific articles: *"[A]clear risk of a serious breach by a member state,"*[1023] "*[…] Risk of jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the member state concerned*",[1024]"*[…] Risk of unrelieved double taxation*",[1025] "*There is a risk, without an effective response to transfer pricing issues, that profits might appear to be earned in low- or no-tax jurisdictions*",[1026] *"[…] Resource-effective ways of addressing those risks from the points of view of both government and taxpayers will be of particular importance for developing country tax administrations",*[1027] *"[…] Detection and identification of transfer pricing risk and other BEPS-related risks in the hands of a tax administration*",[1028] "*with the benefit of legal advice, should have even predicted the risk of prosecution this would be sufficient for the law to comply with Article 7,*"[1029] "*the government is susceptible to and convinced of State aid risks.*"[1030] Despite all these references, the concept of risk is barely defined.

Economic theory provides meaningful support for understanding how risk is a related to uncertainty.[1031] More specifically, Perminova[1032] and Olsson[1033] argue that risk arises as a consequence of the uncertainty of future events. Ward, Chapman,[1034] and Loch[1035] confirm the idea that the underlying uncertainty is the source of all risks. Essentially, there is no risk without

[1023] Treaty on European Union [2008] OJ C115/13 (TUE) art. 7, para 1.

[1024]Treaty on European Union and the Treaty on the Functioning of the European Union (*TFEU*) [2016] OJ C202/1, art. 121, para 4

[1025] OECD TP Guidelines, 16, 38: "*risk of inappropriate taxation*", p. 17.

[1026]UN (2017), Practical Manual on Transfer Pricing for developing countries, (2017, p. viii; "*there is a risk that taxpayers, especially MNEs, will be faced with a multiplicity of approaches to applying the arm's length standard in practice that can lead to compliance burdens and the risk of unrelieved double taxation" p. ix; "areas of greatest mispricing risk*" p. x; "minimize the risk of transfer pricing adjustments and to avoid double taxation", p.1.

[1027]UN (2017), Practical Manual on Transfer Pricing for developing countries, (2017).

[1028]OECD (2017), Country-by-Country Reporting: Handbook on Effective Tax Risk Assessment, OECD, Paris, (2017), 3.

[1029] ECHR, *Cantoni v France*, Judgment of 11 November 1996, para 31.

[1030] R.H.C. Luja, 'Legal Protection of the Diligent Recipient of Fiscal State Aid', in P. Pistone, (ed) *Legal Remedies in EU Tax Law,* (IBFD, 2009),256.

[1031] R. Langlois, 'Risk and uncertainty', in P.J. Boettke (ed) *The Elgar Companion to Austrian Economics*, Edited by, (Elgar 1994).

[1032] O. Perminova, M. Gustafsson, & K. Wikström 'Defining uncertainty in projects – a new perspective' (2008) International Journal of Project Management, 26(1), 73–79.

[1033]R. Olsson 'In search of opportunity management: Is the risk management process enough?' (2007), International Journal of Project Management, 25(8), 745–752.

[1034] S Ward and C Chapman, 'Transforming project risk management into project uncertainty management', (2003) International Journal of Project Management, 21(2), 97–105;

[1035]C. H. Loch and De Meyer et all, *Managing the Unknown: A New Approach to Managing High Uncertainty and Risk in Projects*. (John Wiley and Sons, (2006).

uncertainty, but there can be uncertainty without risk. Conversely, the state of absolute certainty implies that there is no risk.[1036]

A clear distinction between risk and uncertainty was provided by Knight in his landmark article: "*Risk, Uncertainty and Profit*".[1037] His contribution pointed out that the difference between uncertainty and risk stands on the concept of measurability. Risk is measurable, while uncertainty not. To make clear the distinction of the two terms, uncertainty might also be called "*unmeasurable uncertainty*" and risk "*a measurable uncertainty*". Risk as "measurable uncertainty" has been also defined as parametric uncertainty.[1038] Parametric uncertainty refers to the uncertainty that arises from the lack of perfect foresight about which of a known set of events with a known set of probabilities will occur in the future. Uncertainty refers to situations in which events cannot be expressed in precise mathematical terms of probabilities. In these terms the concept of risk is reflected in the OECD's definition of risk as included in its guidelines: "*Risk, sometimes called measurable risk, is defined as a case where there is a range of possible outcomes that are each associated with an objectively (i.e. statistically determined) or subjectively ascribed numerical probability. If sufficient data are available, the probabilities involved can be estimated statistically. Alternatively, based on experience, subjective numerical probabilities can be ascribed to the various possible outcomes."*[1039]

The above discussion on how economic theory describes risk and uncertainty can be summarized as follow: First, the term risk does not coincide with uncertainty. Second, the risk concept entails the product of the probability of an event's occurrence and the extent of its impact (or severity).[1040] Within the EU Law framework risk is defined in the Regulation 178/2022, which basically confirms that risk is a product of probability and severity.[1041]

This summary will serve as the basis for detecting the presence of the risk concept in legal instruments. As we will discuss in the following Chapter, the exchange of information mechanism between tax authorities, tax rulings and other legal instruments are based on (legal) risks.

[1036]S.V. Toma, M. Chitită and D. Șarpe, *Risk and Uncertainty* (Elsevier 2012), 975 – 980, in which the authors clarify that "*the state of absolute certainty implies an accurate knowledge of influent economic phenomena and factors a strict control of the time of occurrence of effects obtained which in terms of mathematical probability theory is a probability of occurrence and development of that economic phenomenon equal to one.*"

[1037] See F.H. Knight, Risk, *Uncertainty and Profit*, (Hart, Schaffner and Marx, 1921); G.A. Holton, 'Defining Risk' (2019), Financial Analysts Journal, 60(6), 19-25.

[1038] See e.g.: K. Hasset and J. Sullivan, Policy uncertainty and the economy: a review of the literature, prepared for "Exploring the Price of Policy Uncertainty" A conference co-sponsored by the Becker-Friedman Institute and the Urban Institute Center for Global Development, Washington, DC, April 7-8, 2015.

[1039] OECD, OECD Review of Regulatory Reform, Risk and Regulatory Policy, Improving the Governance of Risk, 2010, 53.

[1040]C.H. Loch, A. DeMeyer and M.T. Pich *Managing the Unknown: A New Approach to Managing High Uncertainty and Risk in Projects.* (John Wiley and Sons, 2006, 14-15

[1041] Art. 3, 9 of Regulation No. 178/2002: "*risk means a function of the probability of an adverse health effect and the severity of that effect, consequential to a hazard*".

Not only economic theory but also management theory have developed several theories to propose solutions for managing risks.[1042] The risk management activity is all the steps put in place to manage risks.[1043] For example - from a taxpayer perspective - applying for and advance price agreement can be part of the risk management activity to reduce (or eliminate) uncertainty as regards the application of laws. [1044] From the tax authority's perspective, the selection of transactions that are considered at risk of non-compliance is also part of the risk management activity. The same can be argued for the EC when the riskier transactions have to be selected out of the preliminary State aid investigations. What we will see next is whether this risk, even if it relates to the same tax position, is assessed differently by each party: tax authority, or EC, or taxpayer.

As we have seen, there is no single, uniform definition of risk. Therefore, it is crucial to select the most appropriate one for the scope of this thesis. We will argue that, within legal science, and for fiscal State aid risks, the most suitable way to define risk is "*the effect of uncertainty on objectives.*"[1045] This definition of risk is broad, not limited to the mathematical quantification of risk, but focused on identifying uncertainties that may affect our objectives.[1046] In simpler terms, under this broad definition, risks are simply those uncertainties that matter. This definition emphasises the assumption that all risks are uncertainties, but not all uncertainties are risks, because risks are exclusively the uncertainties that matter. The selection of the "right" uncertainty is fundamental to test the hypothesis that, although fiscal State aids are tax advantages, they should be considered an independent risk factor. The opposite assumption represents one of the reasons why dispute avoidance mechanisms are ineffective for State aid investigations (tax rulings, APAs, and other form of exchange of information). A tax gap classified as fiscal State aid faces different forms of uncertainty compared to the same tax gap assessed under a tax law scrutiny. This distinction between tax advantages and State aid advantages will be covered in the part entitled: "*Fiscal State aid: an unrecognised source of uncertainty*" below.[1047]

4.3.3. Legal risk and legal uncertainty.

What did Amazon, Apple and other investigated taxpayers mean when they argued that they could not have considered the "*risk*" of being investigated by the EC for State aid law

[1042] Anthony V. Alfieri, 'The fall of legal ethics and the rise of risk management' (2005) *Geo. LJ* 94, 1909.
[1043] R. Covello, T. Vincent and J. Mumpower, 'Risk analysis and risk management: an historical perspective'(1985), *Risk analysis* 5.2, 103-120.
[1044] Tax risk management is an umbrella term that cover tax compliance, tax planning, and tax controversy in order to manage and reduce all tax risks. See, *inter alia*, C. Quentin, Acceptable levels of tax risk as a metric of corporate tax responsibility: theory, and survey of practice, (2019) Nordic Tax, pp.47-49.
[1045] ISO Standard Publication, Risk Management, BS ISO 31000:2018, (The British Standards Institution, 2018), 77-78
[1046] D. Pritchard, 'Legal risk, legal evidence and the arithmetic of criminal justice' (2018) Jurisprudence, 9:1, 108-119.
[1047] Cf. 4.4.2.

violations.[1048] In seeking protection from the principle of legal certainty, the investigated taxpayers argued about a situation under which the effects of the law and their probability of occurrence were not available and foreseeable to the taxpayer, so basically they argued about law uncertainty (rather than risk).[1049] If the effects of the law were not foreseeable at the time of a transaction, they may be entitled to be protected by the legal certainty principle. Based on the risk definition provided in the previous Chapter (the effect of uncertainty on objectives), it is possible that the investigated taxpayers (Amazon, Apple etc.) have not recognised the right source of uncertainty (i.e. State aid risk). They may have not recognised the uncertainty that matters. Moreover - as mentioned above - risk is expressed also as the product of two components: probability and impact (i.e., severity). In the following sub-Chapters, we investigate how legal risk is defined within the EU legal framework. More specifically legal risk will be analysed under its components of severity and probability to show how they are considered differently by tax policy makers and by the CJEU when assessing the legal certainty protection (despite the lack of a formal definition or approach).

4.3.3.1. Legal risk

Unlike the principle of legal certainty, legal risk is a concept with few and inconsistent definitions.[1050] Scholars have highlighted that legal risks are barely defined since legal science has remained apart from the study of uncertainty based on risk.[1051]
Neither EU Treaties and legislation, nor European institutions and Court of Justice clearly define or refer to legal risks.[1052] Legal risk was addressed in the repealed Recast Banking

[1048] See for example the U.S. Dep't of the Treasury, the European Commission's recent state aid investigations of transfer pricing rulings 56 (2016), para 14.
[1049] Cf. 4.3.2. See also, K F Park and Z Shapira, 'Risk and Uncertainty'. In M Augier and D. Teece, (eds) *The Palgrave Encyclopedia of Strategic Management*. (Palgrave Macmillan, 2017).
[1050] T. Mahler 'Defining legal risk'. Proceedings of the conference "*Commercial Contracting for Strategic Advantage - Potentials and Prospects*", (2007) Turku University of Applied Sciences, 10-31; R. Moorhead and S. Vaughan 'Legal risk: definition, management and ethics', (2015) Executive Report of the UCL Center for Ethics and Law, 36; K. Anderson and J. Black,) 'Legal risks and risks for lawyers'. (2013Herbert Smith Freehills and LSE Regulatory Reform Forum.
[1051] This idea has been expressed by several authors, see, *inter alia*, T. R. Chorvat, 'Ambiguity and Income Taxation', (2004), 23 Cardozo. Rev. 617, who clarifies relevance of ambiguity on substantive tax policy, in particular the taxation of risk taking, but does not address the effect of ambiguity on tax compliance. Other legal scholars have applied behavioural law and economics by explaining the concept that people incorporate information about probabilities into their decision making to tax law. See, e.g., C. C. Fennell and L. A. Fennell, 'Fear and Greed in Tax Policy: A Qualitative Research Agenda', (2003)13 WASH U. J.L. & POL'Y 75; L. A. Fennell, 'Death, Taxes, and Cognition', (2003)81 N.C. L. REV. 567 .
[1052] The General Court mentioned it in two Judgments only to express the binding effect of EU Law in national legal orders and the consequence of an agreement between two Parties, see Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04, *France Telecom v Bouygues* e. a. [2010] ECR II-02099, para. 187; Case T-271/04, *Citymo SA v European Commission* [2007] ECR II-01375, para. 152. Art. 7, para 1 EU in case of "*clear risk of serious breach by a member state of the [European] values*"; Art. 121, para 4 TFEU provides a possibility for the European Commission to address a warning to a member state if its economic policies risk to jeopardise "*the proper functioning of economic and monetary union*"; Art. 126, para 3 TFEU permits the European Commission to prepare a report if "*there is a risk of an excessive deficit in a Member State*"; under Art. 196, para 1 a) TFEU, the Union supports the member state' action in risk prevention relating to civil protection; Art. 207,

Directive,[1053] but the concept was not reported in the Directive currently in force.[1054] Another isolated attempts to define legal risk can be found in the Basel Accords on Banking Supervision, where legal risk "*includes, but is not limited to, as the exposure to fines, penalties, or punitive damages resulting from supervisory actions, as well as private settlements*".[1055] The challenge in establishing a satisfactory definition of legal risk stems from the fact that most, if not all, types of risk contain a legal component that makes the categorisation difficult. Consequently, lawmakers often prefer not to explicitly address or define this concept.[1056]

Raccah highlighted that legal risks may be considered as an oxymoron since law imposes predictable rights and duties and justice conciliates disagreements on law's interpretation.[1057] However, as we discussed in the second Chapter, EU law is far from certain.[1058]
In various publications, scholars have identified elements that could be classified under the heading of legal risks.[1059] Moorhead and Vaughan define legal risk taking into consideration

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para 4 a) relating to the common commercial policy foresees , in case the agreements in the field of trade in cultural and audio-visual services risk prejudicing the Union's cultural and linguistic diversity, the Council shall also act unanimously, as well as, under b) in the field of trade in social, education and health services; Art. 256, para 2 TFEU provides Decisions given by the General Court in proceedings brought against Decisions of the specialised courts which may be subject to review by the Court of Justice "*where there is a serious risk of the unity or consistency of Union law being affected*", as well as for a preliminary ruling and in general the First Advocate General may propose it, on the basis of Art. 62 of the Protocol (No. 3) of the Statute of the Court of Justice of the European Union; Art. 7, para 3 of the Protocol (No. 5) of the Statute of the European Investment Bank specifying that "the Board of Directors shall [. . .] lay down the terms and conditions of any financing operation presenting a specific risk profile" and under para 6 "*the Bank shall protect itself against exchange risks by including in contracts for loans and guarantees such clauses as it considers appropriate*" and Art. 7 provides the same protection in referring to the risks. Lastly, Art. 19, para 2 states that "*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*".

[1053] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), (OJ L 177, 30.6.2006, p. 1).

[1054]Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (*OJ L 176, 27.6.2013, p. 338–436).*

[1055] Basel Committee on Banking supervision, International Convergence of Capital Measurement and Capita Standards (BASEL), 2005, 48.

[1056] In 2005, the European Central Bank (ECB) manifested its intention to provide a definition of legal risk within the operational risk. Under the ECB considerations: "*a general definition of legal risk would facilitate proper risk assessment and risk management, as well as ensure a consistent approach between EU credit institutions. It would also be worthwhile examining the extent to which one should take into account the fact that legal risks are inherently unpredictable and do not generally conform to a pattern. In addition, the management of legal risk would have to be consistent with the management of operational risk as a whole*". For these reasons, the ECB suggest that CEBS should carry out further work to clarify the definition of legal risk. See European Central Bank, Opinion of 17 February 2005 on a proposal for Directives recasting Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions (2005/C 52/10).

[1057] A. Raccah, 'Reframing Legal Risk in EU Law', in E. Mišćenić, A. Raccah, Legal Risk in EU Law, (Springer, 2016), 3, 4.

[1058] Cf. 2.4.4.

[1059] See, e.g. Schuyler K. Henderson, *Henderson on Derivatives*, (LexisNexis, 2009 in particular Chapter 10 on Legal risk: the law, certainty and derivatives; and Christos Hadjiemmanuil, 'Legal risks and fraud: capital charges, control and insurance' in Carol Alexander (ed.) *Operational Risk: Regulation, Analysis and Management*, (International IN-house Consel Journal 2003), 74-100; K.J. Wurz, 'The definition of legal risk and its management by central banks', (2007) International In-house Counsel Journal, Vol. 1, No. 1, 43-49.

two approaches.[1060] Under the dominant approaches, legal risks are defined considering the broad impact of all business risks with legal consequences, which defines legal risk as significant legal consequences that flow from actions attributable to the business. Under this narrow definition, legal risk is defined as a risk originating in legal work product or legal uncertainty, which in turn has significant business consequences. The International Bar Association's (IBA) has embarked on analysing and making suggestions on the elements of legal risk in a systematic way by trying to define risk management for law firms as a result of a claim, a legal failure or changes in the law.[1061] Bakker and Kloosterhof identify the legal environment, created by tax laws, international agreements, and the interpretation of both as the primary source of risk.[1062]

Mišćenić, and Raccah have identified several legal risks in the context of EU law, including the creation of new obligations, changes to the existing EU law, unclear EU legislation, failure to fulfil EU obligations, and claims based on EU law.[1063] They conclude that "*any person may be affected by a legal risk in EU law as long as his legal obligations are objectively unclear and unexpected. Managing this legal risk means providing legal protection against any legal threat by insuring, on the one hand, a stable legal implementation of EU law, and on the other hand, enough flexibility in the legal interpretation of EU law to appreciate the legal risk*".[1064] In their analysis, legal risks are considered in different fields of law: food regulation, bank regulation etc. However, fiscal State aid risks are not considered.

Examining EU law through the lens of legal risk management could become a practical approach of the EU lawmaking process, potentially providing useful tools to European institutions if the EC applies a risk analysis in the lawmaking process.[1065] In these studies, legal risk management is approached through different steps, including risks identification, risks classification, and impact assessment. The EU law-making process is one of the most considered aspects.[1066] As part of the Better Regulation policy, the EC itself stated that "*decision-makers are often faced with the need to reduce or eliminate the risk of adverse effects to the environment*

[1060] R. Moorhead and S. Vaughan, Report on legal risk: definition, management and ethics, 2015, pp.45-49, where the authors by defining legal risk debate between the narrow and broader definition of legal risk highlights the third element of risk definition which is about ownership: seeking to specify which part of the business owns that risk: lawyer or businessman.

[1061] See International Bar Association, 'The Management of Legal Risk by Financial Institutions', (2003) Draft Discussion Paper, Working Party on Legal Risk,78; See also J. Benjamin, 'Sources of Legal Risk for Financial Institutions, report of the IBA Symposium on Legal Risk' , in BIS Review 135/2009,pp.1-34; and R. McCormick, *Legal Risk in the Financial Markets*, (Oxford University Press, 2006), 123-156.

[1062] A. Bakker and A. S. Kloosterhof, *Tax Risk management: From Risk to opportunity*, (IBFD 2010), 64.

[1063] E. Mišćenić and A. Raccah, *Legal risks in EU Law, Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe*, (Springer, 2016), 12.

[1064] Ibid14.

[1065] M Smith, 'Evaluation and the salience of infringement data' (2015) EJRR 1, 90–100.

[1066] See Alberto Alemanno's studies on risk regulation: A. Alemanno 'What role for a chief scientist in the European Union system of scientific advice?' (2014) Eur. J Risk Regul 3, 1–17; A. Alemanno *EU risk regulation: towards a European government of health, safety and environmental risks, modern studies in European Law* (Hart Publishing 2016); A. Alemanno and A. Spina 'Nudging legally – on the checks and balances of behavioural regulation' (2014) Int J Const Law 12(2),1–27; A. Alemanno F. Den Butter and A. Nijsen *Better business regulation in a risk society*. (Springer (2014)

or to health. When the problem you are dealing with is affected by risk, i.e. you can attach probabilities to different possible outcomes, the IA will have to include a risk assessment as a tool to determine the best policy to deal with this".[1067]

As a partial conclusion, legal risk is a concept that is implicitly present in the EU legal framework, even though it is not expressly defined. In the lawmaking process, the identification of legal risks should be precisely addressed in each specific law area, such us fiscal State aid law in our case. The risk of being investigated by the EC is an independent legal risk that warrants specific attention. For the sake of clarity, the term 'risk' addressed in this thesis is not part of the TP functional analysis: "*taking into account assets used and risks assumed*",[1068] but rather focuses on the legal risk of State aid disputes. If risk involves an uncertainty of future events, the attempt to seek *ex-ante* legal certainty - via dispute avoidance mechanisms - may be a new field of application of the risk concept. This is particularly relevant in international taxation law and State aid law framework, where addressing uncertainty and its improvement it is considered as a priority.[1069]

In the next sub-session, legal risk will be considered in its two components: impact (severity) and probability. Splitting the (legal) risk in its two components helps in clarifying the difference between legal risk and legal uncertainty, and how legal risk and legal uncertainty are considered differently by the CJEU and lawmakers.

4.3.3.2. The severity component of legal risk through CJEU and Tax Policy Makers's lens

It is crucial to consider the impact (severity) of a TP transaction when proposing tax policies, such as a dispute avoidance mechanism for fiscal State aids. Severity, as a risk component, represents the amount affected by a risk event - the impact.[1070] In the State aid law framework, the impact of transactions is indeed taken into consideration by EU lawmakers.

Safe harbours[1071] and *De Minimis* State aid regulation[1072] are examples of mechanism related to the impact of the transactions rather than the probability of correctness. For instance, the "*De*

[1067] European Commission, Impact Assessment Guideline, 2009.
[1068] OECD (2022) Transfer Pricing Guidelines2022, OECD Publishing, Paris, B.9.13.
[1069] H. C. Holte and L. Angvik, 'Q&A: OECD FTA Head Prioritises Tax Certainty', (2018) 29 Int'l Tax Rev. 28; See also IMF/OECD (2019), *2019 Progress Report on Tax Certainty*, (OECD 2019).
[1070] Marshall Rex, Malcolm Smith, and Robert Armstrong. 'The impact of audit risk, materiality and severity on ethical decision making: An analysis of the perceptions of tax agents in Australia' (2006) *Managerial Auditing Journal* pp.89-90; Chiarini, Bruno and Elisabetta Marzano. 'Is the Severity of the Penalty an Effective Deterrent? A Strategic Approach for the Crime of Tax Evasion'. (2016), pp.23-24.
[1071] S. Buriak, *Administrative Approaches to Avoiding/Minimizing Transfer Pricing Disputes, in Fundamental of Transfer Pricing, A practical guide,* (Wolters Kluwer, 2019), 191.
[1072] In order to ensure compliance, Member States must notify the Commission of proposed State aid advance. De Minimis regulation is one of the exceptions to the notification requirement based on impact of the measure, which allows overall aid of less than 200.000,00 euro over three fiscal years. See Commission Regulation (EU) No 1407/2013 of 18 December

Minimis threshold" sets a precise severity level, which trigger the notification duty.[1073] The severity of the amount of tax unduly unpaid is also relevant for quantifying related administrative penalty or, in some jurisdictions, to differentiate between criminal and administrative law.[1074]

Another example of regulation that considers the impact of the transaction can be found in the exchange of information mechanisms between tax authorities.[1075] The OECD CbC reporting is another illustration of a blueprint for tax policy that mandates an exchange of information only for those companies having a consolidated revenue exceeding750 million.[1076] This threshold itself does not represent itself a tax avoidance mechanism. However, this information does not provide us with more additional insights from a likelihood perspective. Nevertheless, the risk of tax avoidance increases simply due to the heightened severity of the transaction. The current tax policy provisions take into consideration legal risk and, more precisely, the severity of the transaction plays an important role in triggering the exchange of information, or other predetermined actions. Therefore, for proposing a dispute avoidance mechanism to reduce fiscal State aid disputes based on TP transactions, the consolidated revenue threshold will be considered a valuable factor that increases the risk of fiscal State aid dispute.

On the contrary, when the CJEU analyses the level of legal uncertainty required to grant protection of the legal certainty principle, the risk (the level of uncertainty) is assessed without considering the severity component.[1077] As discussed in the second Chapter, the CJEU demands that 3 conditions shall be met for seeking the legal certainty protection: the level of uncertainty, the good faith of those concerned, and a risk of serious repercussions.[1078] Although these conditions are tested together, they do not have the same relevance. The large number of good faiths past relations and the objective uncertainty of EU law are sufficient conditions.[1079] The financial repercussions as such are not adequate for claiming the legal

2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de Minimis aid Text with EEA relevance, OJ L 352, 24.12.2013, p. 1–8.

[1073] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de Minimis aid Text with EEA relevance, OJ L 352, 24.12.2013, p. 1–8.

[1074] Bruno Chiarini, and Elisabetta Marzano, 'Is the Severity of the Penalty an Effective Deterrent? A Strategic Approach for the Crime of Tax Evasion'. (2016) 56.

[1075] The OECD's AEOI Common Reporting Standard (CRS) is a framework approved by the OECD Council on 15.07.2014. It calls on jurisdictions to obtain information from their tax authorities and automatically exchange that information with other jurisdictions on an annual basis. See OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic Exchange of Financial Account Information – Common Reporting Standard, 13 February 2014. Under this framework, the Council Directive 2011/16/EU (known as the Directive on Administrative Cooperation (DAC)), is the fundamental piece of EU legislation on administrative cooperation in direct taxation. The DAC was amended in 2014, 2015, 2016 and 2018, gradually extending its scope.

[1076] OECD *Guidance on the Implementation of Country-by-Country Reporting – BEPS Action 13*, (OECD,2019) 67.

[1077] Cf. 2.4.5. According to the risk definition, this concept cannot even be defined as risk.

[1078] Judgment of 17 September 2014 in C-562/12 *Liivimaa Lihaveis*, , EU:C:2014:2229, para. 81; C-262/12, *Vent de Colère*, EU:C:2013:851, para 40.

[1079] Judgment of 13 December 2012 in C-465/11 *Forposta y ABC Direct Contact*, EU:C:2012:801, para. 45.

certainty protection.[1080] Basically, when the CJEU evaluates the possibility of offering protection via the legal certainty principle, the legal analysis is irrespective of the amount of aid and the recipient's size, [1081] but it takes into consideration the level of uncertainty.[1082]

The CJEU methodology to assess the legal certainty protection (i.e., disregarding the severity) is consistent with the analysis of State aid compliance. As discussed earlier, the Basel Accord defines legal risk as part of the operational risk (i.e. from the internal organizational point of view).[1083] From the taxpayer's perspective, operational risk differs from compliance since compliance pertains solely to adherence to tax laws, while (operational) risk involves managing to delineate the final tax position (risk and opportunities).[1084] The operational component is a function of the organization's nature, including the characteristics of its primary economic activity and how this is managed, rather than simply a product of the misapplication of tax laws. Consequently, addressing operational risk requires more than just focusing on adherence to the letter of tax regulations; it involves implementing adequate information and control systems capable of providing accurate and complete information on which to base tax returns and disclosures.

Going back in State aid law, from the correctness standpoint, it is irrelevant whether the amount of unpaid tax is 13 billion, as in the Apple case,[1085] or less than 100 euros. Whenever economic benefit is provided, the financial situation of the undertaking is improving due to state intervention.[1086] The magnitude of state intervention is not relevant from a pure correctness perspective. However, it may be relevant to consider risks and the related opportunities, bearing in mind that when trade is affected, competition may be distorted.[1087] The advantage (the amount) and the distortion on competition are "*often treated jointly in the assessment of State aid as they are, as a rule, considered inextricably linked*".[1088]

[1080] E. Sharpston, 'The Shock Troops Arrive in Force: Horizontal Direct Effect of a Treaty Provision and Temporal Limitation of Judgments Join the Armoury of EC Law', in M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law*, (Hart, 2010), 263.

[1081] Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* ECLI:EU:C:2003:415, para 81.

[1082] Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV* [1994] ECR I-4541, [1995] 1 CMLR 881, 21.

[1083] Operational risks are defined as the risks of loss resulting from inadequate or failed internal processes, people, systems or external events. See Basel Committee on Banking supervision, International Convergence of Capital Measurement and Capita Standards (BASEL), 2005; See also European Central Bank, Opinion of 17 February 2005 on a proposal for Directives recasting Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions (2005/C 52/10).

[1084] A. Bakker and A. S. Kloosterhof, *Tax Risk management: From Risk to opportunity*, (IBFD), 45.

[1085] EC Press release IP/16/2923, State aid: Ireland gave illegal tax benefits to Apple worth up to 13 billion, Brussels, 30 August 2016.

[1086] A. Ezrachi, *Eu Competition Law - An analytical analysis to the leading cases*, (Hart, 2016), 641.

[1087] N. Robins and H. Geldof, European Commission, Ex Post assessment of the impact of State aid on competition, European State Aid Law Quarterly, Vol.17, No. 4, pp. 494-508.

[1088]Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), para 186; See also Joined Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 81. P. Nicolaides, 'Competition and Advantage under Internal Market and State Aid Rules: Is

As a partial conclusion, the possible amount of State aid is not considered by the CJEU in its *ex-post* analysis aimed at granting the tax payer protection based on the legal certainty principle. However, the legal risk of State aid, including the amount at stake, is relevant for tax policy makers. In the EU Tax Paper n.67, tax risk is defined as "*the risk of being considered non-compliant when audited*".[1089] The potential impact of tax loss is taken also into consideration by both tax administrations and the EC to prioritize their audit.[1090] Therefore, in framing a tax policy proposal aiming at avoiding fiscal state disputes, the severity component should be considered.[1091] This approach aligns with the EC's goal to better target State aid investigation, where "better target" also means focusing on fiscal State aids with a larger impact.

4.3.3.3. The probability component of legal risk through CJEU and Tax Policy Makers's lens

Along with severity, probability is the other component of the risk. The concept of probability illuminates how individuals confront uncertainties of future events, and within the fiscal State aid law context, how taxpayers and tax authorities face the uncertainty of future consequences of State aid law. Given that the foreseeability concept is one of the components of the legal certainty principle, requiring the implications of law have to be predictable, applying probability to test whether the implication of law is foreseeable is a way to determine whether taxpayers deserve the protection of the legal certainty principle due to lack of foreseeability or inability to measure uncertainty with probabilities.

Economics scholars argue that legal uncertainty exists when it is impossible to predict whether a particular set of facts will trigger a sanction with a probability of one.[1092] With legal uncertainty, some individuals cannot anticipate with certainty whether they are above or below the threshold according to the estimates of the enforcement authority. Assuming that the legal certainty has a probability of one, how is this level calculated?[1093] Except for a few notable examples, legal scholarship has not focused on the question of what probability statements mean.[1094] The notion of probability is a way of expressing to what extent an event and its

There a Gap in the Law?' (2013). Legal Issues of Economic Integration Issue 40, No. 3 271–290. The purpose of the paper is to argue that the establishment of a monopoly through the granting of exclusive rights that are contrary to the rules of the internal market must be taken into account in an investigation of whether Article 107(1) applies.

[1089] EU Commission's Directorate-General for Taxation and Customs Union, 'Tax Uncertainty: Economic Evidence and Policy Responses', (2017) Taxation Paper No 67, 8.

[1090] European Commission (2016), Risk management: a guide for tax administrations, EC Taxation and customs union, (2016), pp.45.

[1091] S. Smismans, 'Policy evaluation in the EU: the challenge of linking ex ante and ex post appraisal', Cambridge University Press (2005), EJRR, 6–26.

[1092] L. Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 Duke Law Journal 557; On the possibility of the law being certain in this sense, see C. Sunstein, 'Problems with Rules' (1995) 83 California Law Review 953.

[1093] It must be clarified that every point from one to zero presents some legal uncertainties.

[1094] A. Bakker and S. Kloosterhof, *Tax risk Management, from risk to opportunity*, (IBFD, 2010), 67? Within the various probability definition, the distinction between frequentist and subjectivist interpretations has been used to call into question behavioural law and economics' claim that people do not "correctly" or "rationally" incorporate information

consequence are likely to occur.[1095] Among several ways to categorize probabilities, the following three basic ways of categorizing probabilities are relevant for the purposes of this thesis: (i) the classical, (ii) the frequency, and (iii) the subjective probability.[1096]

First, the classical interpretation to probability is a mathematical, formula-based approach that can be applied whenever we have a situation where we can enumerate the possible outcomes and determine their individual probabilities.[1097] The side of a dice offer an illustrative example, as the chances of each side of a dice coming up are equally likely. The application of this interpretation to some actual real case might not be representative of the real likelihood of an event since this approach does not take into account any previous information (or any previous case law as the CJEU actually does).[1098]

The second probability approach is called the frequentist interpretation, also known as the empirical approach.[1099] Several experiments can be conducted under certain conditions considered as equivalent, with equal conditions representing the limits of the applicability of the frequentist approach to law.[1100] From a TP perspective, the key question is whether we might consider the previous case law under equivalent conditions. The equivalent conditions include laws and facts linked with those laws that can be structured as a model. If we argue that every single tax dispute is unique, we cannot apply the frequentist approach to understand the aftermath of our tax positions. In the State aid investigation saga, the EC have assessed more the one thousand allegedly tax rulings provided to seven hundred MNEs.[1101] Only a small percentage have led to EC formal investigations, decisions and therefore CJEU cases. The uniqueness of each event is a significant differences between the subjective and the frequentist interpretation of probabilities, the latter taking a class of events to which a probability or frequency refers. In the frequency interpretation, there is no probability without

about probabilities into their decision making. Most the papers belong to the risk assessment by regulators such as the Environmental Protection Agency, s*ee, e.g.*, Matthew D. Adler, 'Against Individual Risk: A Sympathetic Critique of Risk Assessment', (2005) 153 U. Penn. L. Rev. 1121; Matthew D. Adler, 'Risk, Death and Harm: The Normative Foundations of Risk Regulation', (2003) 87 Minn. L. Rev. 1293; David E. Adelman, 'Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law', (2004) 79 Notre Dame L. Rev. 497 ; and evidence law, in particular the use of scientific evidence in the courtroom, *see, e.g.*, G. Mitchell, 'Mapping Evidence Law', (2003) Mich. St. L. Rev. 1065).

[1095] There are other terms that are generally used to indicate probabilities: odds are defined as the probability that the event will occur divided by the probability that the event will not occur. The term chance can have many meanings and can be expressed in percentage, proportion or words, such as "likely".

[1096] The axiomatic probability is excluded from the scope of this thesis.

[1097] A. Hájek, 'Interpretation of probability', in Edward N. Zalta (ed). The *Stanford Encyclopedia of philosophy*, (Ed. Center for the study of language and Information, 2012) 78.

[1098] C. Yablon, 'The Meaning of Probability Judgments: An Essay on the Use and Misuse of Behavioural Economics', (2004) U. Ill. L. Rev. 899.

[1099] M. Fischer, Carol, M. Wartick, and M. Melvin Mark, 'Detection probability and taxpayer compliance: A review of the literature' (1992) *Journal of accounting literature* 11,1.

[1100] J. Manhire, 'Toward a perspective-dependent theory of audit probability for tax compliance models'.(2013) Va. Tax Rev. 33, 629.

[1101] J. Derenne and D. Vallindas, 'Recent EU State Aid Judgments Offer Mixed Results' (2019) 96(1) Tax Notes International 23.

a specified reference class.[1102] This view excludes single-event probabilities, which, by definition, specify no reference class. When taxpayers try to predict the correctness of a TP position, they face a reference class problem. What class should we look at to determine how many times the investigation of the tax position occurs? Every tax positions? Every TP positions? Every State aid investigation on TP positions? Every State aid investigation on TP position applying for a one-sided method rather than two-sided? Making the reference class more specific provides us with more information, but the more information inserted, the narrower the class becomes until the reference is unique.

In the legal domain, this uniqueness is known as the case-by-case approach, which entails not general and abstract "*class*" but singular and factual circumstances.[1103] Therefore, the frequentist approach can be applicable but with limitations and constraints generated by a class problem. As discussed earlier, the CJEU evaluates deemed uncertain legal positions by taking exclusively EU law and its case law (previous similar cases) as a reference.[1104] Particularly, when there is a well-established case law on a certain EU provision, it is unlikely that the CJEU concedes the legal certainty protection.[1105] On the contrary, when no case law exists, the first case can be a valuable argument for seeking the legal certainty protection.[1106] In other words, in terms of probability, if a frequent interpretation can be applied, the case at stake presents more certainties than a case considered as unique.

The last probability approach is the so-called "*subjective probability*", which covers cases considered as unique. It is based upon a state of knowledge or the quantification of a personal belief, and for this reason, it is considered the vaguest approach.[1107] There are situations in which past statistic does not generate reliable information since the analysed event might be considered as unique. A TP position and the factual circumstances related to the single case can be considered as unique. In general, tax probability statements are best understood using

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[1102] The reference class is a method of predicting future by looking at similar past situation and their outcomes. See, *inter alia*, D. Kahneman and A. Tversky, 'Judgment Under Uncertainty: Heuristics and Biases', (1974) Science, vol.85,1124-1131.

[1103]In order to have greater clarity the only possible solution is by prosecuting the less obvious cases at CJEU level. The EC decision does not provide legal certainty: See, M. Wathelet, 'Commitment Decisions and the Paucity of Precedent', (2015) Journal of European Competition Law and Practice Vol 6 Issue 8, 553.

[1104] Cf: Cpt.2.4.5, 3.4.2. In the case at stake, the EC has also retroactively applied the OECD TP guidelines: See Action brought on 22 May 2018, Amazon EU and T-318/17 *Amazon.com v. Commission*, para 56: "*Eighth plea in law, alleging that the decision violates the principles of legal certainty, retroactivity, and non-discrimination, and an essential procedural requirement because it assesses the validity of the 2003 ATC by reference to post-dating OECD Guidelines. The decision retroactively and discriminatorily applies, and improperly holds the applicants and Luxembourg to, standards in the 2017 OECD Guidelines on transfer pricing first issued after the Commission opened the procedure under Article 108(2) TFEU, and long after the adoption of the 2003 ATC*". See also Action brought on 14 December 2017, T-816/17*Luxembourg v. Commission*, 5th plea in law: "*the recovery of the aid is incompatible with the principle of legal certainty, considering the good faith of the Grand Duchy of Luxembourg in the application of transfer pricing and the fact that the new transfer pricing approach applied by the Commission in the contested decision could not have been foreseen*".

[1105] C-61/79, *Denkavit Italiana* [1980] ECR 1205, para. 21; C-57/93, *Vroege* [1994] ECR I-04541, paras. 28-30; Joined Cases C-367/93 to C-377/93, *Roders and others* [1995] ECR I-02229, para. 45; C-415/93, *Bosman* [1995] ECR I-04921, para. 146; C-104/98, *Johann Buchner* [2000] ECR I-3625, para. 40.

[1106] Although it is not decisive: cft 3.4.2.

[1107] E.T. Jaynes, 'Bayesian Methods: General Background'. in Justice, J. H. (ed.). *Maximum-Entropy and Bayesian Methods in Applied Statistics*. (Cambridge University Press, 1986), 77. See also N.I. Al-Bajjar and J. Weinstein, A *Bayesian model of Knightian uncertainty*, (Springer, 2013).

a subjectivist interpretation of probability rather than a frequentist interpretation.[1108] When a taxpayer is able to apply a frequentist probability (i.e. more case law), the possible effects of law are more foreseeable compared with the subjective probability (no case law). When we find consistent case law with an acceptable degree of similarity, the frequent approach is reliable. Conversely, when the case is unique, the subjective probability approach is the exclusive method to foresee uncertain future event.

Risk is the situation under which the decision outcomes and their probabilities of occurrences are known to the decision-maker, and uncertainty is the situation under which such information is not available to the decision-maker (the Knightian unmeasurable uncertainty).[1109] According to the CJEU, the EC's analysis should consider all relevant evidence, which was available at the time, as well as foreseeable developments.[1110] The "*available information*" to the EC includes, beyond what is in the file, any information obtainable during the administrative procedure. However, developments that may jeopardize an advantage in the future should be taken into account, as the analysis of the existence of an advantage is an ex-ante one.[1111] Boria has analysed the "*Jurisprudential appreciation of the risk of international evasion or tax avoidance*" in the EU tax law.[1112] In particular, the author brings - as an example - some occasions where the CJEU has excluded the eligibility of a cause of justification for the contrast of the tax avoidance on the basis of the non-recognition of rigorous evidence about the "*risk of tax evasion*" by citing Leur-Bloem Case.[1113] Interestingly, the CJUE has never used the term *"risk of tax evasion*" in its judgments, but instead uses "*the presumption of tax evasion*".[1114] In the current State aid investigations on individual tax rulings, the "*presumption of selectivity*" is one of the most discussed topics. In plain English, presumption is "*a belief that something is sure because it is likely, although not certain*", and in legal English is "*a fact of believing that something is true without having any proof*".[1115] The lack of certainty is a commonality and it is the reason why the "*the presumption of selectivity*", or the "*presumption of advantage*", or more general "*the presumption of State aid*" can be called the risk of State aid.

Member states are obliged to notify those fiscal transactions that they consider deemed State aid. Determining what could be considered a deemed State aid is crucial. It would not be efficient (and maybe not workable for the EC) if member states submitted every transaction for review. Conversely, if member states do not submit any transactions, the EC would lack a basis to initiate investigations. The concept of the risk of State aid addresses this challenge.

[1108] S.B. Lawsky, 'Probably? Understanding Tax Law's Uncertainty', (2009) 157 U. Penn. L.Rev.
[1109] A. Mie, and D. J. Teece, *The Palgrave encyclopedia of strategic management*, (Palgrave Macmillan, 2021),13.
[1110] Case C-73/11 P, *Frucona Košice* v *Commission,* ECLI:EU:C:2013:32, paras 73 and100.
[1111] C-362/19 P, *Commission v Futbol Club Barcelona*, ECLI:EU:C:2021:169, para 86. See also the related Opinion of AG Pitruzzella, para 76.
[1112] P. Boria, *Taxation in the European Union*, (Springer 2017), 131.
[1113] C-28/95 - Leur-*Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam* 2, ECLI:EU:C:1997:369, 1996.
[1114] Ibid, para 49.
[1115] See Cambridge Dictionary, https://dictionary.cambridge.org/fr/dictionnaire/anglais/presumption, last accessed 18.01.2022.

Risky transactions should be the subject of a specific exchange of information between member states and EC. Currently, in the fiscal State aid domain, there is a lack of exchange of information mechanisms based on State aid risky transactions.

As partial conclusion, although legal risk is not expressly cited by EU courts and EU fiscal law makers, the concept of risk is embedded in both law and case law with some differences. Certain probabilities, components of risk, may be not suitable to be applied in the legal domain, and other can be used only in certain circumstances. The fiscal State aid law framework is inherently uncertain, and when applicable, the frequentist probability presents a higher level of foreseeability compared to the subjective probability. In any case, the availability of the information is a *conditio sine quam non* for being able to calculate the risk, including fiscal State aid risks.
In the next sub-Chapter, although the legal risk concept is not expressly cited, we unveil how it is embedded in several legal tax instruments.

4.3.4. Unveiling legal risks in the tax law framework

In the previous part of this sub-Chapter, we discussed how the legal risk concept is intended by tax law policy makers. In this part, we delve into how administrative laws and regulations have embodied the legal risk concept to define the limit of the power of public authorities, and to promote certainty, and compliance.[1116]

4.3.4.1. Legal risk within the tax law framework

The content of the legal risk has been discussed to explore how is understood by judges, and by tax policy makers. One of the partial conclusions is that risk is not a novel topic on the ongoing process of modernization of international taxation.[1117] While there is no unique definition of tax legal risk, there is a unanimous confirmation that it is composed of different sources of risk.[1118] Here, we will focus on the risk related to "*tax law uncertainty*", particularly in the context of TP transaction in relation to State aid law. Our approach is original compared

[1116] S. Roman, "Literature Review: X. Oberson, International Exchange of Information in Tax Matters–Towards Global Transparency, Edward Elgar Publishing, 2018." *Intertax* 47.10 (2019).
[1117] K. Khadija, I. Kireta and O. Popa, 'CFE Forum 2015: Tax Governance and Tax Risk Management in a Post-BEPS World', (2015) European Taxation, OECD Vol1, p.22.
[1118] T. Segal and W. Maroun, 'Tax Risk-Management analysis: comparison between the United States of America, the United Kingdom and South Africa', (2014) Journal of Economic and Financial Sciences, pp.56. See also H.F. Wunder, 'Tax risk management and the multinational enterprise', (2009) Journal of International Accounting, Auditing and Taxation, 18.

to previous studies on legal risk, as fiscal State aid law uncertainty has never been assessed from this perspective.

Tax authorities and law makers globally aim to identify revenue by pinpointing greater tax risks, while practitioners are called to deal with managing tax risks not only for corporate management issues but also due to the increased tax disclosure requirements as ASC 740-10 (former FIN 48), and DAC6.[1119] In the subsequent parts, we have selected several tax legal instruments that are based on legal risks.

4.3.4.2. Tax Opinion Standards

Tax lawyers, while not mathematicians nor economists,[1120] are required by tax opinion standards to make probability assessments regarding the merits of a client's tax return position or tax-favored transaction.[1121] In the USA, for instance, the lexicon used to identify the degree of uncertainty is filled with predictive terms used typically to indicate probabilities in legal domain: *"more likely than not*", "*substantial authority*", "*realistic possibility of success*", "*reasonable basis",* and "*not frivolous/frivolous*".[1122] Each of these predictive level of certainty is associated with numerical probabilities, with "*will*" occupying the extreme position representing 100% success, "*more likely than not*" reflecting more than 50% certainty, "*substantial authority*" ranging from 50% to 50% certainty, "*realistic probability of success*" positioned at more than one-third likelihood, "*reasonable basis*" extending from ten to 20%, "*nor frivolous*" from five to ten percent, and "*frivolous*" below 5%.[1123] Although these measurements appear precise, very different considerations arise when tax lawyers assess the law, the facts, and the legal arguments to support the likelihood of their clients' compliance.[1124]

In addition to the more formalized predictive levels of certainty, there are also colloquial expressions that ironically indicate the full scale of likelihood from 0% to 100%. For example, 1% is "*not in a month of Sundays*", 2% "*not bloody likely*", 3% "*I wouldn't wish it on my enemies*", 98 % "will*, at the Ivory Soap Level*", 96% "*I would be astounded if we lost*", 90% "*I would tell my mother to*

[1119] See EU Council Directive (EU) 2018/822 of 25 May 2018, art.1 b20 and the IFRS Interpretations Committee, *Uncertainty over Income Tax Treatments*, October 2015 (IFRIC 23, June 2017).
[1120] With some reasonable exceptions: R. K. Craft and Joe G. Baker. 'Do economists make better lawyers? Undergraduate degree field and lawyer earnings', (2003) *The Journal of Economic Education* 34(3) 263-281.
[1121] R.W. Wood, 'The Uneasy topic of Tax Opinion Standards', (2019) Tax Notes Federal, 98.
[1122] See for example: US I.R.C. 6662(d) (B)I; IRC 6694(a) (2)(B), US I.R.C. 6664(d)(3)C.
[1123] Reg. § 1.6662-4(d) (2). See also D. J. Ventry Jr and B.T. Borden, Probability, 'Professionalism, and Protecting Taxpayers', (2014) 68 TAX LAW, 83.
[1124] R.P. Rothman, 'Tax Opinion Practice', (2011) 64 Tax Law 301.

do this", and others.[1125] These expressions highlight the spectrum of probability in a less formal but often more relatable manner.

However, the challenges related to providing a tax opinion does not end with the likelihood assessment. US treasury regulations provide that for taxpayer to obtain relief from tax penalties base on argument that they relied on good faith on the advice received through the tax opinion, the opinion must be based on "*all pertinent facts and circumstances*".[1126] Therefore, the challenging task for tax lawyers is to provide a robust tax opinions for penalty avoidance purposes, which address both arguments in favor and against.[1127] However, taxpayers may be cautious about providing grounds that could trigger future investigations by tax authorities. Moreover, tax opinions have intrinsic limits since they cannot assume the tax consequences at issue, and it is inappropriate to assume any legal conclusion underlying the tax opinion.[1128]

Despite these difficulties, tax opinions contribute to a consistent understanding of what *ex-ante* evaluations may entail. First, the high degree of law uncertainty has led to the necessity of trying methodologies that can create a scale of degree of uncertainty, rather than framing it as simply certain or uncertain. The *ex-ante* evaluation is based on pre-identified degrees of certainty that require a specific methodology for their assessment. This approach efficiently promotes compliance by focusing attention not on all cases but only on those that are "*more likely"* to not be supported by the tax authority.

Under the State aid law framework, the absence of a risk analysis is a notable gap. In an environment in which resources are limited, adopting a process framework based on risk would facilitate tax authorities, the EC, intermediaries, and other stakeholders in addressing target issues in accordance with existing laws and regulations. Implementing a risk-based approach can enhance efficiency and effectiveness, allowing for a more targeted allocation of resources and a systematic handling of potential State aid concerns.

4.3.4.3. Risk responsive

Responsive regulations, such as cooperative compliance programs based on risk,[1129] involve the administration of the determinate law by officials who tailor their regulatory behaviour according to the compliance posture adopted by individuals subject to the relevant law.[1130]

[1125] See lawprofessorblogs.com, Tax notes, March 21, 2005, Taxanalysist, tax humor, A detailed Guide to Tax Opinion Standards.
[1126] Reg. section 1.6664-4(c)(1)(i).
[1127] H. M. Field, 'Tax Opinions & Probability theory: Lessons From Donald Trump', (2017) Tax notes 12.
[1128] A. Wood and Donald P. Board, 'Tax Opinions the SEC Way',(2015) Tax Notes, 1307.
[1129] J. Freedman, 'Responsive regulation, risk, and rules: Applying the theory to tax practice' (2011) UBCL Rev. 44, 627.
[1130] N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy*, (Clarendon, 1998), 21-23; J. Braithwaite, *Restorative Justice and Responsive Regulation*, (Oxford University Press, 2002).

This regulatory model encourages taxpayers to comply with the law and employs enforcement powers against those who resist, making it a sensible approach to managing a mass tax system with limited resources.[1131]

An example of responsive regulation in the tax domain is the International Compliance Assurance Programme (ICAP) initiated by the OECD Forum of Tax Administrations. ICAP is a voluntary programme for a multilateral co-operative risk assessment and assurance process. It is designed to be an efficient, effective and coordinated approach to provide multinational groups (MNEs) willing to engage actively, openly and in a fully transparent manner with increased tax certainty with respect to certain of their activities and transactions. The enhancement of tax certainty is one of the declared drivers behind the development of the ICAP program.[1132]This is coherent with the risk concept since this risk assessment and communication gives more information about the uncertainty of the possible compliance of the tax position. The non-compliance means to dispute, and this is one of the main reasons why risk management is considered as one of the dispute avoidance mechanisms together with APAs, safe harbours and joint tax audit.

From a theoretical perspective, investors are assumed to be risk-neutral.[1133] If they were risk averse, uncertainty would be inherently harmful to them. The OECD in the IMF/OECD tax certainty report assumed that there is good reason to assume that large MNEs should act in a risk neutral fashion because of them diversifications.[1134] Conversely, for smaller operations, risk aversion may be a reasonable premise and could have adverse effects on investment. The consequence of unknown State aid risk assessment is related to that variation of risk preferences across enterprises. This implies that tax uncertainty can lead to both inequities and inefficiencies between MNEs and standalone entities. The differing risk profiles of entities can create disparities in their ability to navigate and absorb uncertainties, impacting their investment decisions and overall competitiveness.

[1131] B. Mark, 'Responsive Regulation and the Uncertainty of Tax Law- Time to Reconsider the Commissioner's Model of Cooperative Compliance?' (2007) eJournal of Tax Research, 89-90.

[1132] Forum on Tax Administration, *International Compliance Assurance Programme, Pilot Handbook 2.0*, (OECD 2019), 5. The first ICAP pilot was launched in Washington D.C. in January 2018. It brought together eight tax administrations (from Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom and the United States) with a number of MNEs headquartered in these jurisdictions.

[1133] S. Bruno, S. Ahmed, A. Shapiro and A. Street, 'Risk neutral and risk adverse approaches to multistage renewable investment planning under uncertainty', (2016) European Journal of Operational Research, Vol. 250, Issue 3, 979-989. P. Beck, J. S. Davis and W. Jung, 'Experimental Evidence on Taxpayer Reporting under Uncertainty', (1991) The Accounting Review, Vol.66, No. 3, 535-558.

[1134] The OECD /IMF Report on Tax Certainty presented to the G20 in March 2017, 12.

4.3.4.4. Risk-based

Risk-based regulation is commonly understood as regulators operating decision-making frameworks and procedures to prioritize regulatory activities and the allocation of resources based on a risk assessment of the potential impact that regulated firms pose to the regulator's objectives.[1135] In the OECD Review of Regulatory Reform, Risk and Regulatory Policy, Improving the Governance of Risk, the OECD dedicates an entire Chapter to explaining the different legal dimensions of risk regulatory concepts and how they interface with administrative law.[1136] The overlap of administrative law and risk lies in the role of law in constituting and limiting public administration by establishing competences and restricting the discretion of the decision-makers.[1137] The risk regulatory concept serves similar role by regulating administrative powers through the limitation of discretion and the regulation of administrative power.[1138] Decision-makers are required self-limit their power on the basis of a risk assessment defined *a priori* to set boundaries on what they can do. A risk assessment technique should be applied, firstly, to select the tax audit cases and, secondly, as part of a holistic and cooperative approach, to enhance compliance.[1139]

The first aim of the risk assessment is based on a comprehensive list of likely factors of compliance, as observed by tax administrations, which may serve useful explanatory variables in a model of compliance risk.[1140]The introduction of risk regulatory concept aims to promote a rational-instrumental model of public administration. In this context, Porter notes that: "*In a political culture that idealises the rule of law, it seems bad policy to rely on mere judgment, however seasoned. […] A decision made by the numbers, or by explicit rules of some other sort, has at least the appearance of being fair and impersonal. Scientific objectivity thus provides an answer to a moral demand for impartiality and fairness. Quantification is a way of making decisions without seeming to decide. Objectivity lends authority to officials who have very little of their own*".[1141]

Risk-based or problem-centered regulations involve normative and political choices, emphasizing the importance of understanding why regulators target the risks and problems.[1142]

[1135] J. Black (ed), *Risk-Based Regulation: Choices, Practices and Lessons Learnt' in Risk and Regulatory Policy: Improving the Governance of Risk*, (OECD,2010), 5.
[1136] OECD, *OECD Review of Regulatory Reform, Risk and Regulatory Policy, Improving the Governance of Risk*, (OECD, 2010), 43.
[1137] E. Fisher, 'The Rise of the Risk Commonwealth and the Challenge for Administrative Law', (2003) Public Law, 455-478.
[1138] Treasury Board of Canada, *Best Practices in Risk Management-Coordinated Conclusions from PMN and KPMG*, (Treasury Board of Canada, 1999), 67,68. See also Audit Commission, *Worth the Risk?* (UK Government, 2001).
[1139] M. Sultan Khwaja, R. Awasthi, and J. Loeprick (eds), R*isk-based tax audits, Approaches and Country Experiences*, (The World Bank, 2011 23.
[1140] OECD, *Compliance Risk Management: Managing and Improving Tax Compliance*, (OECD, 2004) 12. See also, OECD, *Compliance Risk Management: Use of Random Audit Programs*'. OECD,2006). OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*. (OECD, 2006.
[1141] T. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life*, (Princeton University Press, 1995), 8.
[1142] R. Baldwin and J. Black, 'Driving Priorities in Risk-Based Regulation: What's the Problem?' (2016) Journal of Law and Society, Vol.43, 4, 565-95.

The key distinction from the traditional rules-based approach is that in risk-based regulation the use of hard regulation is a strategic choice, not an end in itself. Sparrow has described this approach as a shift from a focus on illegality into a more agile approach aimed at minimizing the impact of the illegal actions.[1143]

4.3.4.5. Uncertain tax positions

Uncertain tax position is a US reporting standard based on a self-disclosure requirement for tax advisors.[1144] This standard requires tax advisor (or entities) to consider whether it is "*probable"* that the tax authority would accept the tax advisor's interpretation.[1145] While the term "*probable*" is not defined in IAS 12, entities commonly use the working definition of "*more likely than not*".[1146] Instead of a general assessment of *"uncertainty*", this measure requires tax advisors to analyze and disclose each tax position only if it is "*more likely than not*" that the benefit will be sustained upon examination (the recognition phase).[1147] Once a tax position meets the "*more-likely-than -not threshold*", tax advisors need to measure the advantage to determine the amount of benefit to be recognized in the financial statement (the so-called measurement phase).[1148] In essence, as the risk is a product of probability per severity, the uncertain tax position standard force taxpayers and tax advisor to assess risk by trying to measure how much tax risk a company is prepared to take.

TP remains a significant tax risk and is a major focus of tax audits.[1149] It is subject to the "*uncertain tax position*" rule, and the US tax authorities consider TP transactions as the riskiest

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[1143] M. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*. (Brookings Institutions Press, 2011), 103-104.

[1144] The so-called "Uncertain tax position" was the FASB Interpretation (FIN) No. 48 that has been updated with the Art. 740-10 FASB Accounting Standards Codification (ASC).

[1145] Although an entity is required to consider the probability the tax authority would accept an entity's treatment, 'probable' is not defined in IAS 12. In our experience, entities often use a working definition of 'more likely than not,' which is consistent with the definition of 'probable' in other standards, such as IAS 37, *Provisions, Contingent Liabilities and Contingent Assets*, and IFRS 15, *Revenue from Contracts with Customers.*

[1146] Tax Executives Institute, *TEI Comments on FAF Post-Implementation Review of FIN 48*. Tax Ex. Inst, 2011, 1.

[1147]Financial Accounting Standards Board (FASB) Interpretation No. 48: Accounting for Uncertainty in Income Taxes, which is "now found in ASC 740-10-05, 25, 30, 35, 40, 45, 50, and 60 of the FASB Codification. At 32 n.2, it requires disclosure of "uncertain tax positions". See also, C. Susan Borkowski & Mary Anne Gaffney, 'FIN 48, Uncertainty, and Transfer Pricing: (Im)Perfect Together?' (2012) 21 J. INT'L. ACCT., AUD. & TAX'N. 32, 37 ("APAs may be used by transnational companies to minimize the uncertainty arising from their cross-border transfer pricing transactions, and therefore reduce their uncertain tax positions.

[1148] Blouin, J., C. Gleason, L. Mills, and S. Sikes, 'What can we learn about uncertain tax benefits from FIN 48?' (2007) National Tax Journal 60,521–35. See also E. Pauly, 'Raising penalty standard "more likely than not" creates conflict between tax lawyers and their clients', (2008) Washburn Law Journal 47, 757–783.

[1149] Ernst & Young (E&Y). *2010 Global Transfer Pricing Survey: Addressing the Challenges of Globalization*. (Ernst & Young, 2011). Ernst & Young, *2011–12 Tax Risk and Controversy Survey: A New Era of Global Risk and Uncertainty*. (Ernst & Young, 2012). See also R. Feinschreiber, Practical Aspects of Transfer Pricing, (1996) 70 FLA. B.J. 41.

and most uncertain.[1150] However, if an advance pricing agreement covers the transaction, the tax authority will consider a transaction covered by the APA to be priced at arm's length, allowing for the full tax benefit from the position to be recognized[1151] In the absence of APAs, tax-advisor must assess the strength of their position based on the extent of the documentation and economic analysis supporting the position. Within the scope of TP transactions, this provision serves as a disclosure triggered in cases where an APA has not been applied for, as the APA itself provides certainty for both taxpayers and tax administrations.

In the legal domain, while risk is not always explicitly defined, it can be discerned, particularly in legal instruments like dispute avoidance mechanism, which anticipate risky tax positions. The US "*Uncertain tax position*" rule is a risk-based rule that requires tax advisors (and taxpayers) to apply the risk concept within the law framework, and disclose to the tax authorities only the risky tax positions. TP transactions are considered risky (i.e., uncertain) by definition. However, a TP transaction covered by an APA is deemed "certain", namely, not risky. The application of the risk concept within tax law framework has been already applied within the US and others tax law framework to find tax position that should be selected to be further disclosed to the tax authority. A similar application has never been used for State aid purpose.

4.3.4.6. Transfer Pricing Reporting Risks

In the second Chapter, the discussion catered around how TP has been considered uncertain. In this Chapter, uncertainty has been analysed from the risk perspective. Notably, the OECD, the EU, and tax authorities around the world have produced documents to identify risky TP transactions. For example, under BEPS Action 13, large MNEs are mandate to prepare a country by country (CbC) report containing aggregate data on some selected economic activities (i.e. those deemed riskier).[1152] These CbC reports are shared with tax administrations for high level TP and BEPS risk assessments.[1153]

In particular, the *Country-by-Country Reporting (CBCR): Handbook on Effective Tax Risk Assessment* explores various approaches to conducting proper tax risk assessments applied in different countries.[1154] In these reports there are listed different types of "*tax risk indicators*" that may be identified using information contained in CbC Reports. The evidence from CbC reports indicates that the exchange of information can be a very important tool for the detection and

[1150] S.C. Borkowski, 'Proactive Transfer Pricing Risk Management in PATA Countries', (2014) Journal Accounting Research, p. 456-457.
[1151] J. F. Reinganum and L.L. Wilde, 'A Note on Enforcement Uncertainty and Taxpayer Compliance'.(1998) Quarterly Journal of Economics, 103(4), 793.
[1152] OECD, *Action Plan on Base Erosion and Profit Shifting, 13th Action: "Transfer Pricing Documentation and Country-by-Country Report",* (OECD, 2013), 89.
[1153] OECD, *Guidance on the Implementation of Country-by-Country Reporting, BEPS Action 13*, (OECD, 2019), 12.
[1154] OECD, *Country-by-Country Reporting: Handbook on Effective Tax Risk Assessment*, (OECD, 2019), 23.

identification of transfer pricing risk and other BEPS-related risks in the hands of a tax administration. This information is used alongside other data held by tax authorities and serves as a basis for further inquiries.[1155] Not all transactions need to be exchanged but only those transactions that are considered as a tax risk indicator.[1156]

For example, the 2012 OECD Report *"Dealing Effectively with the Challenges of Transfer Pricing"* set forth different "*future"* that may suggest TP risks.[1157] The UN Practical Manual of TP set forth different "*flags*" suggesting further investigation.[1158]

For example:

(a) *"[…] companies with related party transactions where the related party has a low marginal tax rate and makes payments which appear to be large in reference to the relationship".*[1159]
(b) "Significant transactions with related parties in low jurisdictions: Where transactions take place with lowly taxed and related entities there is a risk that mispricing will incorrectly attribute excess profits to the lowly taxed jurisdiction."[1160]
(c) "Transactions with related parties in countries with low effective/marginal tax rates, especially "secret jurisdictions" from which tax information is not likely to be shared."[1161]
(d) "Companies paying large management fees or paying royalties or other charges for the use of intellectual property". [1162].
(e) "TP policies and methodologies are not up to date and do not longer accurately reflect the operation and management of business". [1163]
(f) "Effective Tax Rate: Significant variations between the effective tax rate reported at group level and the nominal rates to which it is subject can be the result of transfer pricing that allocates too much profit to low tax jurisdictions". [1164]

It must be recalled that the term *"tax risk indicator*" does not refer to a transaction certainly causes tax avoidance or profit shifting. Otherwise, it will be a certainty and not a risk by definition. The stated purpose of a CbCR is to provide tax administrations with information necessary to determining which entities to audit further to detect - via tax risk indicators - aggressive tax planning, and tax avoidance.

[1155] P. Joshi, 'Does Private Country-by-Country Reporting Deter Tax avoidance and Income Shifting? Evidence from BEPS Action Item 13', (2020) Journal of Accounting Research, Volume 58, Issue 2, 34. A. Knobel, and A. Cobham, Country-by-Country Reporting: How Restricted Access Exacerbates Global Inequalities in Taxing Rights (2016), p.89.
[1156] OECD , *Country-by-Country Reporting: Handbook on Effective Tax Risk Assessment*, (OECD, 2019), 64.
[1157] OECD, *Dealing Effectively with the Challenges of Transfer Pricing*, (OECD, 2012)25.
[1158] United Nations, UN Practical Manual on Transfer Pricing for developing Countries, (UN 2017),428-434.
[1159] OECD (n. 1157).
[1160] Ibid.
[1161] Ibid.
[1162] Ibid.
[1163] Ibid.
[1164] Ibid, p.25.

Indications of the need to assess high-level transfer-pricing risks and other base-erosion and profit-shifting risks have also been the stated purposes of the CbC Reporting implemented in the EU Union.[1165] Among others, one of the main differences between the EC CbC Directive and the OECD CbCR is that the former states that member states may suffer revenue losses and there is "*the risk of competition*" to attract MNE Groups by offering them further tax benefits.[1166]

In the EU fiscal State aid law framework, there is currently no provision that provide tax authorities, and the EC with the necessary information to select riskier fiscal State aid transactions, particularly concerning TP transactions. This highlights a gap in the current framework, as there is no explicit mechanism for identifying and addressing potential risks associated with fiscal State aid in the same way that CbCR is designed to address risks related to transfer pricing and profit shifting.

4.3.4.7. Hallmarks: risky factors that must be reported

Under the EU law framework, the implementation of modern compliance risk management principles for tax administrations is consistently pursued through guidance addressed to tax authorities to conduct risk management, and dispute avoidance mechanisms - such exchange of information – to facilitate and foster compliance.

The EC has published a guide to provide background information, best practices and a framework for the implementation of modern compliance risk management principles for tax administrations.[1167] The EU JTPF considered risk assessment as an important dispute avoidance mechanism for TP and has included it in the work programme of the JTPF for 2011-2015.[1168] Moreover, various Directives on Tax Cooperation (such as DAC 3,4,6) are based on considered risky measures that tax administration (or intermediaries) shall exchange

[1165] Council Directive (EU) 2016/881, of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, para 15.
[1166] Ibid, para 2.
[1167] European Commission, Directorate General Taxation and Customs Union, *Compliance Risk Management Guide for Tax Administrations*, (Fiscalis Risk Management Platform Group, 2010, 45,46.
[1168] European Commission, 'Report on Transfer Pricing Risk Management', EU Joint Transfer Pricing Forum, 6 June 2013, 32.

or disclose.[1169] Particularly the DAC 6 lists only determined TP arrangements that shall be declared.[1170]

In this context, the term "*Hallmarks*" is used by the legislator to define those risky arrangements that trigger the duty to automatic exchange the information. The hallmark is a risk-based arrangement since the Directive describes hallmarks as characteristics of features of cross-border arrangements that might present an "*indication of potential risk of tax avoidance*".[1171] It must be recalled that risks entail uncertainty. Therefore, if an arrangement is listed as hallmark, it does not mean that it is qualified as tax avoidance. However, the selected hallmarks by the legislators present a risk of tax avoidance. Within fiscal State aid law framework, there is not a similar indication of potential fiscal State aid, or a *State aid hallmark*. Actually, the exchange of information based on hallmarks is outside of the scope of State aid law, at least formally. As expressed in the Council Directive DAC 6, the exchange of information and the access to that information by the EC "*does not discharge a member state from its obligations to notify any State aid to the Commission*".[1172] The exchange of information mechanisms are considered as a valid dispute avoidance mechanism since is based on transparency and early identification of risky transactions.

The EC Communication on the work of the EU JTPF on TP documentation for associated enterprises in EU clarifies that for tax administrations, risk assessment is regarded as the most important case selection tool and as a tool for specific inquiries and tax audits. For businesses, on the other hand, risk assessment may help taxpayers to concentrate pro-actively on "risk" transactions, which may require more detailed explanations and documentation and can also help to improve the TP system applied.[1173] However, a dispute avoidance mechanism for State aid is missing. The question arises: What are the *State aid hallmarks* that should be listed as a case selection tool for the notification or for the EC for its future investigations on uncertain TP transactions? This will be explored in the next sub-Chapter.

[1169]Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, *OJ L 332, 18.12.2015, p. 1–10;* Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, *OJ L 146, 3.6.2016, p. 8–21;* Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, ST/7160/2018/INIT, *OJ L 139, 5.6.2018, p. 1–13.*The term "intermediaries" are firm or persons such as consulting firms, banks, lawyers, tax advisors, accountants etc. that can help their clients set up scheme to comply with law.

[1170] It seems that the term "*hallmark*" is based on the EC's understanding of BEPS Action 12. See OECD, *Mandatory Disclosure Rules, Action 12, Final Report*, (OECD Publishing, 2015).

[1171] Art 1, 1(b) 18, Council Directive (EU) 2018/822, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 2018.

[1172] Council Directive (EU) 2018/822, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 2018, preamble 6.

[1173] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum on transfer pricing documentation for associated enterprises in the EU, COM (2005) 543 final., para 3.2.

4.3.5. Partial conclusion

Dispute avoidance mechanisms is the OECD and EU preferred solution to provide early certainty through reducing the risk of disputes.[1174] Risk is not a well-known concept in EU law, and in the legal science generally. (Legal) uncertainty is the commonly used concept indicative of the uncertainty of law effects that may cause disputes between tax authorities and taxpayers, or between the EC and member states in case of State aid investigations. However, risk and uncertainty are two distinct concepts. First, not all forms of uncertainty are risks but only the uncertainty that matters.[1175] Moreover, risk is the result of a product of impact (severity) and probability. In the EU legal framework, although legal risk is barely used and defined, its content can be extrapolated from judgments and law, despite the existence of some differences.

When the CJEU has been asked for *ex-post* protection based on the legal certainty principle, it has evaluated the level of law uncertainty and its effects without considering the impact (severity). The CJEU approach is perfectly in line with State aid law. It is irrelevant if the amount of unpaid tax is several billions, as in the Apple case, or just a few euros. Whenever the economic benefit is provided, the financial situation of the undertaking is improved because of the State aid. The impact of a state intervention is not relevant from a pure correctness standpoint. In granting protection based on the principle of legal certainty, the CJEU considers the level of uncertainty, i.e., the measure the uncertainty of a particular case and the ability of taxpayers to foresee the legal effect (the probability of the outcome). The CJEU evaluates uncertain legal positions by taking as reference EU law and the judgments on previous similar cases. Instead of expressing two extreme concepts as certain and uncertain, a legal risk analysis expresses more precisely the nuances ranging from certainty to uncertainty.

Unlike the CJEU judgments, dispute avoidance mechanisms, such as DAC 6, (CbC) and other forms of exchange of information mechanisms, consider both (legal) risks components: (i) the possible impact at stake (companies with a conspicuous turnover), and some indicators that present a likelihood that can be disputed. Even in this case, although the legal risk concept is not precisely defined by the EU legislator, it can be detected in several dispute avoidance mechanisms. The legal risk – with both its components – is used by the EU lawmakers as a tool to limit the amount of information available and select only legal risky transactions that can be disputed. The individuation of the proper legal risk is paramount to manage the aimed uncertainty. In the various EU Directives on tax cooperation, in the JTPF Report on TP Risk Management as well as in the EC Compliance, Risk Management Guide fiscal State aid risks are never mentioned or cited as an independent risk factor. The EC Communication on the work of the EU JTPF on TP documentation for associated enterprises in the EU clarifies that for tax administrations, risk assessment is regarded as the most important case selection tool and a tool for specific inquiries and tax audits. On the other hand, risk assessment may help

[1174] Cf: 2.2.3, 2.2.4.

[1175] On the contrary, all risks can be seen as uncertainty: Cf:4.3.2.

taxpayers concentrate pro-actively on "risk" transactions, which may require more detailed explanations and documentation and can also help to improve the TP system applied.[1176]

A dispute avoidance mechanism for State aid is missing. In the next section, some of the fiscal State aid risk indicators (that we call fiscal *State aid hallmarks*) will be proposed as a case selection tool for the notification or for the EC for its future investigations on uncertain TP transactions.

4.4. State aid Hallmarks: A Dispute Avoidance Mechanisms for Transfer Pricing Transactions

4.4.1. Introduction

The US Department of Treasury mentioned the "*risk concept*" in its working paper on State aid. [1177] In particular:

(a) In fact, "*neither the internal review nor third-party review and audit of the affected firms by tax and audit professionals*" signaled in any way that their tax position could possibly trigger State aid inquiry.[1178]
(b) Adopting new enforcement regimes with retroactive effect will hinder companies' "*ability to assess risks*" and plan the future […]. It also undermines the G20 agenda to improve tax certainty.[1179]
(c) Before the EC started its investigations in 2014, none of the companies had acknowledged the "*risk of State aid investigations*" in their audited financial statements.[1180]

How can the "*the risk of State aid investigations*" be analyzed? The literature in this regard is silent.

This sub-Chapter analyses the risk of fiscal State aid disputes (*i.e. "the risk of State aid investigations"*) for TP transaction in the EU with particular reference to tax rulings. Dispute avoidance mechanisms – such as exchange of information mechanisms – are based on pre-identified risky indicators that will be subject to the exchange (so-called hallmarks). In this regards, fiscal *State aid hallmark*s have never been identified as a basis for notifications. In the following sections, a series of fiscal *State aid hallmark*s will be listed and discussed. In the second section, we argue that, contrary to other TP pricing risks (CbC reporting, TP hallmarks in the DAC6), fiscal State aids have not been recognized as a specific source of uncertainty. In the

[1176] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum on Transfer Pricing Documentation For Associated Enterprises in the EU, COM (2005) 543 final, para 3.2.
[1177] U.S. Dept't of the Treasury, The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings, 56 (2016), para 14.
[1178] Ibid, para 15.
[1179] Ibid, para 1.
[1180] Ibidpara 3.

third section, the definition of *State aid hallmark* is provided. In the fourth section, since objectives affect the risk identification, we highlight the difference between the objectives of the EC and those of the tax authorities as well as between State aid law and tax law. Due to the difference in their respective objectives, a different risk should be assessed (State aid risks). In the fifth section, we argue that tax rulings not only do not guarantee legal certainty, as they are not neutral from the State aid investigation perspective, but they even increase the risk of disputes. In the sixth section, we argue that a bespoke reference system can be considered as fiscal *State aid hallmark*s. In the seventh section, we consider how tax competition can be a guarantor of arm's length transactions between member states as the competition is considered a guarantor of arm's length transactions between companies. The final section is devoted to the partial conclusions.

4.4.2. Fiscal State aids: An unrecognized source of uncertainty

As previously discussed, risks are considered uncertainties that matter.[1181] Therefore, it is fundamental to recognize State aid investigations as uncertainties that matter. A shortcoming in this respect jeopardizes the risk assessment for fiscal State aid risks.

The OECD recognized that BEPS actions and their implementation may cause tax uncertainty and increase the risk of disputes.[1182] The IMF, the OECD and the CFE support the idea that "*advance certainty for taxpayers*" is the best counter-measure to improve tax certainty and decrease the risk of dispute.[1183] Particularly for TP transactions, early certainty should be established through "*cooperative compliance programmes and tax rulings practices*".[1184] *Ex-ante* tax certainty provided through tax rulings and Advance Pricing Arrangements (APAs) has proved to be "*an effective tool for the prevention of tax-related disputes, especially with respect to* TP *issues*". APAs are tools to provide certainty for taxpayers in planning the future and "*prevent the risk of subsequent disputes*". Moreover, the tax certainty concept embeds both concepts of "*tax certainty for taxpayers*" and "*certain taxation for tax administration*".[1185] The double perspective of the tax certainty supports the reason why the OECD Forum on Tax Administration has been working on improving tax certainty by enhancing tax co-operation between tax administrations and taxpayers.[1186] To obtain tax certainty in advance, a contribution is required from both

[1181] Cf section 4.3.2.
[1182] Cf section 2.2.4.
[1183] Cf section 2.2.2, and 2.2.3.
[1184] CFE, 'Opinion Statement on European Tax Advisers' Policy Priorities for the EU Mandate 2019-2024', Submitted to the European Institutions on 12 July 2019.
[1185] Cf. section 2.2.2.
[1186] OECD, *Tax Challenges Arising From Digitalisation – Report on the Pillar One Blueprint: Inclusive Framework on BEPS*, (OECD Publishing, 2020), 99, 100. See also, J.E. Colliard, L. Eden, and C.P. Georg, 'Tax complexity, Tax certainty, and the Pillar one and two blueprints, Public Consultation document on the Reports on Pillar One and Pillar Two Blueprints', (2020) Tax Management International Journal, 50.2, 76-89

taxpayers and public authorities. Can it be argued that OECD framework is valid also in the fiscal State aid framework?

All IMF/OECD Reports on tax certainty, the EU Taxation paper 67, and the CFE Opinions on tax certainty have reported several sources of tax uncertainty. State aid law, its application, and enforcement are not considered sources of uncertainty in all these documents and reports. However, scholars express the view that fiscal State aid investigations adversely affect tax certainty: "*An era of uncertainty*?",[1187] "*Tax Rulings: Uncertain Certainty*",[1188] "*Tax uncertainty can be identified at the supranational level as well*".[1189] "*State aid discussion will decrease the certainty of taxpayer*".[1190]

This lack of consideration is relevant since, as we have seen in the BEPS framework (and in the risk analysis), the first step to improve the tax certainty is the awareness of what is causing the uncertainties. Tax certainty is measured against its level of uncertainty. If a source of uncertainty is not recognized, it may be improbable that further actions will be taken to improve that tax certainty. (Fiscal) State aid law and its correspondent enforcement are not considered as a source of tax uncertainty.

Regarding the OECD and the IMF, this lack of consideration may be a consequence of State aid law being outside their scope. Despite their different scope, the OECD and the EU are moving together to counteract forms of tax avoidance. The OECD's "*BEPS actions*" and the "*EU action plan to fight against tax avoidance*", are two valid examples among other actions.[1191] However, as previously argued, the OECD has recognized that the BEPS implementation may cause tax uncertainty, and therefore other counteractions shall be taken.[1192] APAs and dispute

[1187] I. Verlinden, S. De Baets, P. Deré, P. Szotek and J. Voje, 'Transfer Pricing Developments in the European Union', in M. Lang, A. Storck and R. Petruzzi (eds) *Transfer Pricing Development around the world*, ,(IBF, 2018), 67.

[1188] A. Bal, 'Tax Ruling: Uncertain Certainty', in M. Cotrut and others (eds) *Tax Incentives in the BEPS Era*, (IBFD, 2019), 231.

[1189] J. Schwarz, 'Tax uncertainty is a certain global risk', (2017) Kluwer International Tax Blog. See also, P. Valente, 'Taxation in the Future – A new EU: Vision and impact', (2016) Kluwer International Tax Blog.

[1190] See S. De Baets and J. Gao, 'Recent developments on Comparability Analysis in Transfer Pricing', in M. Lang, A. Storck, R. Petruzzi (eds) *Transfer Pricing Developments Around the World*, IBFD2018), 191. A. Bal (n.1188).231.

[1191] OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing; Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy - Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation - Taxation of saving, 2018, pp.56.; See also, Communication from the Commission to the Council, the European Parliament, and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within EU, SEC (2007) 246, Com (2007) 71 final, 2007. In the new Code of Conduct on Business Taxation, the Council notes that some of the tax measures covered by the Code may fall within the scope of the provisions on State Aid in Articles 107 to 109 of the TFEU. In such cases the group should suspend its examination of the measure concerned until the end of that state aid procedure. See General Secretariat of the European Council, 'Council conclusions on the reform of the Code of Conduct for Business Taxation', (2022) FISC 214, ECOFIN 1131, 10.

[1192] The need of the Action 14 is one tangible example: "*The actions to counter BEPS must be complemented with actions that ensure certainty and predictability for business.",* See OECD (n. 1191), 14, 21 and 23.

prevention mechanisms are proposed as a preferred choice, among others, due to their ability to reduce or eliminate the risk of dispute.[1193]

On the contrary, the EC has never recognized the side-effects of fiscal state investigations on tax certainty. The EU taxation paper 67,[1194] the EC Notice on the notion of State aid,[1195] the explanatory Memorandum to the Proposal for the EU Ruling Directive,[1196] the EC Communication on the work of the JTPF [1197]and the JTPF on its report on TP Risk Management[1198] never mentioned State aid law and the related investigations as a possible source of tax uncertainty. In its work on of dispute avoidance at para 46 of the APAs guidelines, the EU JTPF states "*tax administrations [by agreeing on APAs] should ensure that they are able to provide this certainty*".[1199] Consistently, among all EU tax initiatives for improving tax certainty, there are no listed measures to improve the tax certainty affected by State aid law enforcement.[1200] The problem is significant, and the studies about State aid investigations on TP have not addressed this issue from the risk standpoint.[1201] Moreover, as the EC reported in its guide on "*Risk Management Guide for Tax Administrations*", the risk is the events or circumstances that could result in a bad outcome, namely that end up acting as impediments to achieving the objectives.[1202] The risk will be quite different depending on the objectives, which describe the desired outcome and state goal has to be achieved. The objectives are relevant from a risk management standpoint since they will be the starting point on what risks

[1193] OECD, *OECD Secretary-General Report G20 Finance Ministers and Central Bank Governors - June 2019*, OECD, 2019), 92.
[1194] European Commission's Directorate-General for taxation and Customs Union, 'Tax Uncertainty: Economic Evidence and Policy Responses', (2017) Taxation Paper n.67/2017
[1195] European Commission, 'Commission Notice on the notion of State aid as referred to in Article 107(1)', adopted 19/05/2016, C (2016)2946.
[1196] European Commission, 'Explanatory Memorandum to the Proposal for the EU ruling Directive', Com (2015) 135 final, Doc. 10903/12 FISC 77, 2015.
[1197] Communication from the Commission to the Council, the European Parliament, and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within EU, SEC (2007) 246, Com (2007) 71 final, 2007.
[1198] EU Joint Transfer Pricing Forum, Report on Transfer Pricing Risk Management, Taxud, D1, 2013.
[1199] EU JTPF Guidelines for Advance Pricing Agreements within the EU, Annex para 46.
[1200] Regarding all numerous listed EU measures to improve tax certainty, see European Commission, Building a fair, competitive and stable corporate tax system for the EU, COM (2016) 862 final; the Directive 2011/16/EU and implement the automatic exchange of information on tax matters. The agreement was then formalized in December with the adoption of the amended Directive by the ECOFIN Council (Council Directive 2014/107/EU); European Commission, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM (2015) 302 final. European Commission (2016b), Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the *EU*, COM(2016) 23 final; European Commission (2011), Communication from the Commission to The European Parliament, The Council and The European Economic and Social Committee on the future of VAT, COM(2011)851; European Commission (2016c), Proposal for a Council Directive on Double taxation Resolution Mechanism in the European Union, Impact Assessment, SWD(2016) 343 final.
[1201] Some authors have highlighted the diminished tax certainty, see A. Bal, 'Tax Rulings, State Aid and the Rule of Law', in Robert van Brederode (ed), *Ethics and Taxation* (Springer, 2020) 359, 373. Other have highlighted that the EC actions do not address the root cause of the problem of profit shifting, see R. Finley and K. Strocko, 'Amazon and Engie Case Doubt on State Aid Enforcement Approach' (2021) 102 *Tax Notes International* 874; S. M. Colino, The Long Arm of State Aid Law: Crushing Corporate Tax Avoidance (2020) 44(2) *Fordham International Law Journal* 397, 459-460. And other have proposed other solutions based on the current available legal instruments: S.U.K. Niazi and R. Krever, 'Bespoke tax rulings and profit shifting in the European Union: assessing the EU's options', (2021) Australian Tax Forum 36
[1202] European Commission (n. 1167), 13, 14 and16.

should be identified.[1203] If State aid law has different objective compared to tax law, different risks should be taken into consideration. Currently, State aid risks have not been addressed within the framework of TP dispute avoidance mechanisms.[1204]

4.4.3. Fiscal State Aid Risk: The State Aid Hallmarks for Tax Rulings

Although there is no accepted definition of tax risk, scholars, tax authorities around the globe, and practitioners have identified and covered the concept of tax risk.[1205] On the contrary, State aid risk has been neither defined nor covered.[1206]

We address this gap in the literature by defining (fiscal) State aid risk, with the limited scope of State aid risk for TP tax rulings, and by developing theoretical guidance to identify (fiscal) State aid risks (that we define *State aid hallmark*s). Proactively assessing a State aid exposure will help MNEs, tax authorities to anticipate the risk of being subject to an investigation and ultimately of having to repay State aid. Other form of risk related to unpaid tax, such as reputation risks are out of the scope of this thesis.[1207]

Fiscal *State aid hallmark*s are characteristics or features identified as potentially indicative of State aid entailing a notification if met. The hallmarks concept has been taken from the DAC 6.[1208] Hallmark means a "*characteristic or feature of a cross-border arrangement that presents an indication*

[1203] Cf: 4.4.4.

[1204] For example, the Code of Best Practices for the conduct of State aid control aims to make State aid procedure *"[…] simple, clear, predictable, and timely as possible*". However, its scope is limited to procedural aspect. Risk factors are disregarded. See Art. 1 (4) Scope and purpose of the Code, European Commission, Communication from the Commission, 'Code of Best Practices for the conduct of State aid control procedure', C (2018) 4412 Final, 2018.

[1205] S.S. Neuman, T. C. Omer and A. P. Schmidt, 'Assessing tax risk: Practitioner Perspective', 2019 Contemporary Accounting Research, Volume 37, Issue 3,1788-1827; Allen and Overy LLP 'Negotiating the minefield: Managing tax risks in challenging times', (2017) http://www.allenovery.com/SiteCollectionDocuments/Global%20tax%20practice%202017.pdf; Ernst & Young, '2011-12 Tax risk and controversy survey', (2012) http://www.ey.com/GL/en/Services/Tax/2011-12-Tax-risk-and-controversy-survey; J. Freedman, G. Loomer, and J. Vella, 'Corporate tax risk and tax avoidance: New approaches' (2009) *British Tax Review* 1, 74-116; Deloitte, 'Risk transformation and tax: Securing the benefits of enhanced tax-risk management' (2014) https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/2015-deloitteireland-risk-transformation-and-tax-deloitte-ireland.pdf; P. Valente, *Tax governance e tax risk management*. (Wolters Kluwer, 2017); J. Angus, 'The Explosion of Tax Risk'. (2006) International Tax Review, vol. 17, no. 10, 24-26.

[1206] Francioso addresses the risk of recovery. However, tax risks have been not analysed from the risk perspective and the Chapter does not mention state aid risk since tax risk has been defined as the chance of undergoing a tax assessment in the form of state aid investigation combined with the subsequent amount of revenue losses. See C. Francioso, 'State aid and tax rulings: Managing the Risk of Recovery', in P. De Vincentiis et al. (eds.), *The Future of Risk Management*, *Volume I*, IBFD 2019), 374. L. Lederman, 'Best Practices in Tax Rulings Transparency', 2021 Research Paper Number 469. http://ssrn.com/abstract=3969099; S. Shaheen, 'Reputation Is Now a Tax Risk', (2013) 23 INT'L TAX REV. 1

[1208] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, ST/7160/2018/INIT, OJ L 139, 5.6.2018, p. 1–13.

of potential risk of tax avoidance".[1209] For the purposes of this thesis, a *State aid hallmark* is a characteristic or feature of a TP arrangement that present an indication of State aid. Since the purpose of dispute avoidance mechanisms is to avoid disputes, the State aid risk of disputes must consider – on an ex-ante basis – not only the CJEU judgments but also the guidelines and the decisions of the EC. The lessons learnt from the CJEU have had an effect on all stakeholders, the EC included. Therefore, the hierarchy of EU law and its consequences on reducing uncertainty will be considered.

Compared to the meaning of hallmarks as intended by the DAC6, on the one hand, the scope of this thesis is more extensive, since the risk of State aid concerns also domestic arrangements (rather than being limited to cross border arrangement as fundamental freedoms). On the other hand, the scope is limited to only TP transactions. Moreover, all TP hallmarks listed in the DAC do not require the fulfillment of the condition of the "*main benefit test*", which is a test satisfied if it can be established that the main benefit, or one of the main benefits, which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining a tax advantage.[1210] For State aid purposes, a tax advantage that fulfills the condition to be qualified State aid advantage will be considered in the State aid risk analysis. Interestingly, in the DAC6 proposal, the EC suggested two specific hallmarks concerning TP are relevant for State aid: (i) *An arrangement or series of arrangements which does not conform with the arm's length principle or with the OECD transfer pricing guidelines, including the allocation of profit between different members of the same corporate group. (ii) An arrangement or series of arrangements, which falls within the scope of the automatic exchange of information on advance cross-border rulings, but which is not reported or exchanged.*[1211] In the EC proposal, the two TP arrangements have to fulfill the main benefit test. However, both TP hallmarks are absent from the current DAC6. Finally, the DAC6 clearly separated its scope from the State aid scope since "*the Commission does not discharge a member state from its obligations to notify any State aid to the Commission*".[1212]

Exchange information mechanisms between tax authorities, as well as between tax authorities and taxpayers are based on pre-selected risk factors. The following pre-selected *State aid hallmark*s are the basis for defining the criteria on which an exchange of information occurs

[1209] Art. 1, b (20) Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, ST/7160/2018/INIT, *OJ L 139, 5.6.2018, p. 1–13.*

[1210] Annex IV (E), Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, ST/7160/2018/INIT, *OJ L 139, 5.6.2018, p. 1–13.* The main benefit test is fulfilled if "*it can be established that main benefit or one of the main benefits which, having regard to all relevant fact and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage*".

[1211] Annex 1, COM (2017) 335 final, Annex to the Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, (2017) final.

[1212] Preamble 6, Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, ST/7160/2018/INIT, *OJ L 139, 5.6.2018, p. 1–13.*

between taxpayers and tax authorities, and between tax authorities and the EC. The State aid risk analysis will be based on the assessment of the risk of advantage and selectivity. The analysis of the other criteria (i.e. State aid resources, likely to distort competition, and adversely affect trade between state) will not be assessed because once the State aid advantage is demonstrated the other criteria can be presumed.[1213]

4.4.4. The EC is a different authority from tax administration (with different objectives).

The EC is the EU body entitled to investigate State aids. Although State aid law is part of EU competition law, the fiscal domain is not excluded from the EC's investigative powers. Therefore, the EC is entitled to investigate deemed tax advantages already approved by a tax authority that can present a risk of State aid. The aim of this part is to clarify: (i) first, the concept of the objective is relevant for risk assessments, and (ii) fiscal State aid risk assessment will be jeopardized if we omit to consider that the EC and tax authorities have different objectives.

It is well known that objectives are fundamental for properly assessing risks.[1214] The objectives of the risk assessor determine the outcomes of the risk analysis, as objectives affect the selection of those uncertainties that matter. In risk analysis, the objective indicates the desired outcome that has to be achieved. The correlation between objectives and risk has been confirmed by the EC and reported in its guide on "*Risk Management Guide for Tax Administrations*": risk is the events or circumstances that could result in a bad outcome, namely that end up acting as impediments to achieving the objectives.[1215] The risk will be quite different depending on the objectives, which describe the desired outcome and state the goal that has to be achieved. From the perspective of the risk of disputes, the fact that the EC has different objectives compared to the tax authorities is relevant since it sheds light on some differences between fiscal State aid and other tax advantages. The objective represents another supporting argument in considering State aid enforcement as an independent risk factor. The EC itself in its guidelines on "*Compliance risk management guide for tax administrations*" makes that clear: understanding the objective concept is imperative since the organization's objectives are the starting point for identifying risks.[1216] Similarly, the EC guidelines state that, for policy design, a clear policy objective affects the risk assessment and all considerations that will result from the risk analysis.[1217]

[1213] Case 730/79 *Philip Morris*, ECLI:EU:C:1980, para209. Moreover, since fiscal state aids are taxes, and only governments can collect taxes, the "state resources" criteria can also be presumed.

[1214] G. Monahan, *Enterprise risk management: A methodology for achieving strategic objectives, Vol.20*, (John Wiley & Sons, YEAR); H. S. Wayne, 'The importance of objectives in risk management', (1990) *Risk Management*, 37(1), 38-40.

[1215] European Commission (n. 1167)13, 14 and16.

[1216] European Commission, *Compliance risk management guide for tax administrations*, (Fiscalis Risk Management Platform Group, 2010)13.

[1217] EC, 'Impact Assessment Guidelines', SEC (2009) 92,

When EC acts in substitution of tax authorities by ordering the recovery of fiscal State aids, are the objectives of the EC the same of those of tax authorities? The answer to this question clarifies whether fiscal State aid risk analysis shall be considered similar to tax risk analysis.

In general, every tax administration within the EU is a law enforcement organization with the duty of levying and collecting taxes.[1218] With respect to their objective, four categories of strategies can be identified: seeking the highest level of compliance, levying tax efficiently and accurately, customer-oriented tax organization, and payment of taxes as the central objective.[1219] The legal powers of public authorities vary depending on their different tasks.[1220] Therefore, risks will tend to be construed in the light of the particular powers and tasks that have to be carried out as investigations, defining compliance or enforcing. Even different branches of administration that operate with different powers in performing different tasks tend to construct risks differently.[1221]The objectives of tax authorities are not only the aim but also the specific, measurable results to evaluate the performance of a good administration. In other words, how tax administrations and EC understand the role of good administration can itself determine risk constructions.[1222] As regards the risk construction, Fisher emphasizes the contrast between deliberative-constitutive and rational-instrumental conceptions of administrative constitutionalism.[1223] In the former, the role of the public administration is characterized by discretionary terms and some degree of flexibility and the latter is understood more "*mechanically*" as a "*transmission-belt*" of the legislature.[1224] Within State aid cases, the EC

[1218] V. Braithwaite, 'Dancing with tax authorities: Motivational Postures and non-compliant actions', in V. Braithwaite (ed), *Taxing Democracy*, (Ashgate Publishing, 2003), 15-40. Within the tax law framework, other authors have identified similar objectives and their different aspects: collect the right amount of tax, foster compliance, neutrality, legal certainty. See Art. 1.1., note 2, ISO Guide 73, Risk Management Vocabulary, 2009, IBFD, 89. See also C.P. Rossin, 'Tax Strategy Control: The Case of Transfer Pricing tax risk management', (2013) Management Accounting Research, Volume 24, Issue 2, 175-194.

[1219] E.C.J.M. van der Hel van Dijk, European Co-operation and Legal Guidelines for an intra-community tax audit. A comparative survey of legal guidelines for tax auditing in the 27 Member States of the European Union (2009). See also S. Muehlbacher and E. Kirchler, 'Tax Compliance by Trust and Power of Authorities', (2010) International Economic Journal, Vol 24, p.45.

[1220] The term "*authority*" can be used also in a narrower meaning. A "*revenue authority*" expresses "*a term to describe a governance regime for an organization engaged in revenue administration,* where the regime provides for more autonomy than that afforded a normal department in a ministry". See W. Crandall and M. Kidd, Revenue Administration: A Toolkit For Implementing A Revenue Authority, IMF Technical Notes and Manuals 10/08, (IMF, 2010), 8.

[1221] S. Hilgartner, The Social Construction of Risk Objects in Organizations, Uncertainties, and Risk, eds. J. Short and L. Clark (1992);

[1222] Under Art. 41 of the Charter of Fundamental Rights the "*Right to good administration*" is relevant to taxpayers. See H. C.H. Hofmann and C. Mihaescu, *The relation between the Charter's Fundamental rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*, (Cambridge University Press, 2013). See also K. Ka'naska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', (2004) European Law Journal, Volume 10, Issue 3, 556,57. G. Végh and H. Gribnau, 'Tax administration Good Governance', (2018) EC Tax Review 1, 48-60.

[1223] E. Fisher, Risk Regulation and Administrative Constitutionalism (2007), Oxford Hard Publising, 28-40.

[1224] While the powers of tax administration are defined in tax legislation, the exercise of these powers involves a certain degree of discretion. See Ch Evans, J Freedman and R. Krever, (eds.),*The Delicate Balance: Tax, Discretion and the Rule of Law*, (IBFD, 2011); See also S. Griffits, 'Revenue Authority Discretions and the Rule of Law in New Zealand', in C. Evans, J Freedman and R. Krever, *The Delicate Balance: Tax, Discretion and the Rule of Law*, (IBFD, 2011), 155; D. Kalderimis, C. Nixon, and T. Smith, *Certainty and Discretion in New Zealand Regulation*, (2013) NZ Law Foundation Regulatory Reform Project. H. Gribnau, 'Netherlands', in A. P. Dourado (ed.), *Separation of Powers in Tax Law*, (IBFD, 2010) p147-148. K. Brooks, 'A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada' in C Evans, J Freedman and R. Krever, (IBFD, 2011), 69.

actually acts in substitution of the tax authorities when they do no act as a transmission-belt.[1225]In any case, acting as deliberative-constitutive or rational-instrumental, tax administrations pursue their objectives within the tax domain.

The EC objectives are focused on not distorting competition in the EU internal market. Under the EU Treaty, the EC has the responsibility of initiating EU laws, enforcing EU laws, making guidelines, and regulations in competition policy.[1226] When EC acts to enforce State aid law as part of the EU competition law, the umbrella objective of State aid control is to avoid distortions or threat to distortions on the competition.[1227]Commentators use different terminologies to define the objectives as "*non-discrimination*" "*competitive neutrality*," and "*level playing field*".[1228] The distortion of competition may take different forms, and tax advantages are one of them. The EC clearly declares that fighting against aggressive tax planning and combating tax avoidance are amongst its pursued objectives.[1229] It seems that combatting tax avoidance is one objective that the EC shares with tax authorities. The main difference is that tax authorities do not have the responsibility for the correlated effect on competition. For tax authorities, the possible unpaid tax should not be recovered because it implies an unduly competitive advantage, but simply because it represents a missed amount imposed by and due to the State. The idea that the EC invaded the reserved powers of the member states was pointed out in the recent TP cases.[1230] Effectively, the objective of the EC is one of the most

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[1225] S. Daly, 'Trust, administration and State aid', (2020) White Paper presented at the Indiana/Leeds Summer Tax Workshop Series, 89.

[1226] Consolidated version of the Treaty on European Union – Title III: Provisions on the institutions - Article 17, OJ C 115, 9.5.2008, p. 25–26. See also I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law', (2013) CLES Working Paper 3/2013, and the literature therein cited.

[1227] The State aid rules can be found in Part Three, Title VII (Common rules on competition, taxation and approximation of laws) and they form the pillars of the internal market, together with fundamental freedoms: See Art. 3(1)b TFEU sets out that EU include the establishment of the competition rules necessary for the functioning of the internal market, in which regard the EU has exclusive competence. Prot. N.27 to the TEU and TFEU clarifies that "*the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted*". B. Sierra, F. Smulders, 'The limited role of the refined economic approach in achieving the objectives of State aid control: Time for some realism' in C. Micheau, *Liber Amicorum Santaolalla*, (Working Paper, 2014) 6–9. Hofman highlights the dual purpose of the prohibition against State aid: (i) preventing waste of public resources, (ii) preventing the crowding out of efficient private investments by preserving a competitive and open market. See H. C. H. Hofmann, State Aid Law of the EU, in H. Hofmann and C. Micheau (eds.), *State aid law of European Union* (Oxford University Press 2016), 6-10.

[1228] The Commission consider the objective of state-aid rules as "l*imiting distortions of competition, preserving a level playing field and combating protectionism*." See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU State Aid Modernisation, 15, COM (2012) 209 final, 2012. See also https://www.theguardian.com/world/2017/sep/17/margrethevestager-people-feel-angry-about-tax-avoidance-european-competition-commissioner. The meaning of the word "competition" is not defined in the EU Treaties.

[1229] See the press statement as regards the extension of the Commission's State aid investigation on tax ruling to all member states: "*We will use the information received in today's enquiry as well as the knowledge gained from our ongoing investigations to combat tax avoidance and fight for fair tax competition",* European Commission, 'State aid: Commission extends information enquiry on tax rulings practice to all Member States', Press release of 17 December 2014. See also L. de Broe, 'The State aid Review against aggressive tax planning: "Always look a gift horse in the mouth"', (2015) EC Tax Review 2015/6.

[1230] Case T-816/17, *Luxembourg v. Commission*, 2018 O.J. (C 72) 38, 14. See also Irish Department of Finance, 'Explanatory Memorandum for the Members of the Oireachtas Dáil Debate of Government Motion on the Apple State Aid Case', (2016),13; J.P. Finet, 'Apple Ruling Is EU Power Grab, U.K. and Irish Lawmakers Say', (2016) 83 Tax Notes Int'l 1019, 1019–20.

criticized arguments, and the EC should not exceed the scope of its authority by crossing over the limit of tax sovereignty.[1231]In other words, the EU exclusive competence in the area of competition law should not exceed its scope and goes over the limit of the exclusive tax sovereignty of member states. The overlaps between EU competition and tax sovereignty results from the imprecise language of the EU treaty rules, which constitute the source of the "*dilemma of discretion*" and the use of this discretion by the EC.[1232]

The confusion between the EC objectives and the possible stretches over member states' sovereignty in tax matters is exacerbated by the double role of the EC. The EC responsibilities vary in a wide range from *lege lata* to *lege ferenda*. Objectives based on *lege lata* do not necessarily coincide with objectives based on *lege ferenda*. A possible mixing between the objectives related to its legislature function with those related to monitoring of the member state's compliance with State aid law is one of the most criticized arguments supported by governments[1233]and commentators.[1234] Tax harmonization to eliminate interstate tax competition can be one of the legislative objectives. The promotion of competitive neutrality may be an enforcement objective.[1235] When those objectives belong to the same EU public body, the overlap can be stretched. One of the legal instruments implemented to stretch EC's objectives is reflected in the evolution and the use of soft law to expand the scope of State aid law.[1236] This evolution of the soft law approach to pursue the objectives of the EC has complemented its hard law approach.[1237] The lack of clear objectives, combined with an EU law drafted in general terms, generates further uncertainty.[1238] Making the objective of State aid control more transparent

[1231] To understand EU competence in the area of direct taxation is vital to refer to the Art. 5 TEU, which establishes the principle of conferral, subsidiary and proportionality. See V.H. Guerrero, 'Defining the Balance between Free Competition and Tax Sovereignty in EC and WTO Law: the "*due respect*" to the General Tax System', 2020) German Law Journal, 5(1), 87-100; See also J. Paul, 'Global Tax Governance or National Tax Discrimination: The Case of EU vs. Apple', 2014) North East Journal of Legal Studies, Vol. 39, Article 2, 2019; R.H.C. Luja, 'Do State aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?' (2016) EC Tax Review, Vol.25, No 5-6, 312-324.

[1232] The conflict between the EC and national fiscal legislature is analysed by Schön, in Hancher/Ottervanger/ Slot, EU State Aids, 5th ed. 2016, at13- See also T. J. Doleys, *Managing the Dilemma of Discretion: The European Commission and the Development of EU State aid Policy*, (Springer Science, 2012). A. Biondi, P. Eeckhout & J. Flynn, *The Law of State Aid in the European Union*, (OUP, 2004).

[1233] The Senate Finance Committee complained that the Commission was "*using State aid . . . to achieve a 'reform agenda*.'" Letter from U.S. S. Comm. on Fin. to Jacob Lew, U.S. Sec'y of the Treasury, U.S. Dep't of the Treasury 1 (May 23, 2016); Notes Int'L 862, 862 (2016) asserting that the Commission was "*override national tax law authority*"); U.S. Dep't of the Treasury, 'The EC's recent state aid investigations of transfer pricing rulings', (2016), 1 (arguing that the Commission applied EU law too broadly in the state-aid cases).

[1234] See Reuven S. Avi-Yonah, Advanced introduction to international tax law, 59–65 (2015) Elgar Advanced introductions series, S. Daniël, 'Recovery of Fiscal State Aid: Always Somewhere?' (2016) Kluwer Int. Tax Blog, http://kluwertaxblog.com/2016/10/03/recovery-of-fiscal-state-aid-alwayssomewhere . See contrary: *e.g.*, P. Rossi-Maccanico, 'Fiscal State Aids, Tax Base Erosion and Profit Shifting', (2015) 24 EC TAX REV. 63; M. Vestager, Speech to EU Parliament TAXE 2 Committee 2 (Apr. 4, 2016),

[1235] R. Mason, 'Identifying illegal subsidies', (2020) American University Law Review, Publishing, 2014.

[1236] E. Traversa, 'Fighting Harmful Tax Competition through EU State aid Law: Will the Hardening of Soft Law Suffice?' (2015) European State Aid Law Quarterly, 3. See also M. Cini, 'The soft law approach: Commission rulemaking in the EU's state aid regime', (2001) Journal of European Public Policy, 8(2), 192-207.

[1237] D. Kyriazis, 'From Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings', (2016), Eur. St. Aid. L.Q. 428.

[1238] EC has stated that the objective of EU competition law is to promote consumer welfare. This view does not have been clearly endorsed by CJEU.see N. Kroes (Former EU Competition Commissioner), speech at Fordham Corporate Law Institute, 23 September 2005.

and analyzing the appropriateness of State aid to achieve these objectives is considered one of the main points of the possible reform of State aid control.[1239]

It must be pointed out that the objective of the different authorities should not be confused with the debated objectives of the State aid,[1240]or with the objectives used to assess the selectivity of a State aid measure,[1241] so-called "*objective intrinsic to the reference system"*,[1242] "*objective pursued by the measure in question*",[1243] "*objective of the proposed tax reform*"[1244]. Moreover, objectives shall not be confused with effects.[1245] Although the CJEU seems to support that effect-based doctrine "*Art. 87 (1) EC (now: Art. 107 (1) TFEU) does not distinguish between the causes or objectives of State aid, but defines them in relation to their effects*",[1246] the objectives of the domestic measures alone do not suffice to exclude the measures from classification as fiscal State aid.[1247] In *Gibraltar*, the CJEU held that an inconsistent treatment between the objectives of the system and its actual effect qualifies the measure as selective.[1248]The *Gibraltar* case does not clarify whether objectives should be outside or within the national norms.[1249]

[1239] R. Nitsche and P. Heidhues, 'Study on methods to analysis the impact of State aid on competition', (2006), EC Directorate General for Economic and Financial affairs, Economic Papers,104.

[1240] Commission Notice on the notion of state aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union, 2016/C 262/01, para 67: "*Only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State Intervention*". See also, Case C-15/14 P, *Commission* v *MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi of 27 June 2013, C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

[1241] The possible difference between the objectives of the systems rather than objective of the measure is relevant where the Court tests whether a measure part of a broader system pursue objectives of the measure rather than objectives or the system. See C. Quigley, Comments on State aid, Taxation and Abuse of Law, in Prohibition of Abuse of Law, De la Feria and Vogenauer eds., Hart Publishing 2011, p.115; L. H. López, General thought on Selectivity and Consequences of a Broad Concept of State aid in Tax Matters, 9 EStAL 4, 2010, pp. 814.

[1242] As Adria Wien Pipeline case, the objective of the domestic measure was used as test the prima facie selectivity. In favour of this argument see: Others argued that the objective of the national measure should be part of the justification test rather than prima facie selectivity test. A. Bartosch, Is There a Need For a Rule of Reason in Europe State aid Law? Or How to Arrive At a Coherent concept of Material Selectivity, Common Market Law Review 47: 739-752, 2010; Other argued middle solution, see R. Szudoczky, The Sources of EU Law and their relationships: Lessons for the Field of Taxation, IBFD Doctoral Series, 2013, p. 550-564. See CJEU case law: Case C-170/05 Denkavit, para 37; Case C-284/09 Commission v Germany, para. 53, Case C-487/08 Commission v Spain, para 48. Case T-760/15 & T-636/16*The Netherlands v. Commission,* para. 34, and case T-755/15 & T-759/15 *Luxembourg v. Commission*, para. 22.

[1243] Case C-143/99 Adria-Wien Pipeline, para 41; Case C-409/00, Spain v Commission, para 47; Case C-88/03 Portugal v Commission, para 54; Case C-279/08 P Commission v Netherlands, para 62.

[1244] Joined Case C-106/09 P and C-107/09 P Commission v Government of Gibraltar, para 75,101.

[1245] The possible confusion depends on whether the Court takes the objective as the criterion of comparison with a strict view of the legal features of the two comparable tax treatments, or when the Court takes the factual circumstances as the criterion of comparison.

[1246] Case C-487/06 P, *British Aggregates v EC,* ECLI:EU:C:2008:757, para 85.

[1247] Case C-417/10 3M *Italia*, para 36; Joined Cases C-78/08 to C-80/08 *Paint Graphos*, para 67; Case C-487/06 P British Aggregates, para 84; Case T-2010/02 *Renv British Aggregates Association v Commission*, para 52. See also C. Quigley, 'Comments on State aid, Taxation and Abuse of Law', in R. De la Feria and Vogenauer (eds.), *Prohibition of Abuse of Law*, (Hart Publishing 2011), 509-518; B. Kurcz and D. Vallindas, 'Can General measure be…Selective? Some thoughts on the Interpretation of a State Aid definition', (2008) 45 CML Rev 1, 181; See a different perspective, M. Honoré, 'Selectivity and Taxation, Reflections in the Light of Case C-487/06 P', (2009) British Aggregates Association, 8 EStAL4, 534.

[1248] C-106/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, EU:C:2011:732, para 101.

[1249] W. Haslehner highlights two possible interpretations: see W. Haslehner, 'Transfer Pricing rules and State aid law', in C. HJI Panayi, W. Haslehner, and E. Traversa (eds),*Research Handbook on European Union Taxation Law*, ed. by (Elgar, 2020), 437; Lyal critized the CJEU approach since it affected member states' sovereignty: see R. Lyal, 'Transfer Pricing Rules and State Aid', (2015) 38 Fordham International Law Journal 1017,1029. Others have read this approach in coherence with the equality principle: see M. Lang, 'State Aid and Taxation: Recent Trends in the Case Law of the ECJ', (2012) EStAL

Barthosch highlights that the EC distinguishes between external objectives assigned to a particular tax scheme (as social, regional objectives) and objectives, which are inherent in the tax system itself.[1250] Under this EC interpretation, only the latter are deemed capable of justifying differentiation embedded in a member state's tax system. In the EC view, the whole purpose of the tax system is to collect revenue to finance state expenditure.
The apparent paradox is that the authority entitled to enforce competition law qualifies only to pursue general tax principles, such as - progressivity, ability to pay, and others. In this way, the enforcement authority restricts the available solutions only to goals within a tax scheme that serves the primary purpose of any such system, which is to collect taxes for meeting public expenses. The paradox is apparent since the relevant effects are effects on competition. Therefore, in the current TP case, the discussion should not be reduced to the analysis of whether there is an EC's arm's length standard, and how this standard is compatible with the OECD arm's length standard, [1251] but it is also relevant to analyse the arm's length standard in light of the EC's objectives on competition. Fair competition is also evident in the OECD Guidelines, in which the role of the arm's length standard includes equal treatment, and the placing of MNEs and independent entities on an equal footing for tax purposes by avoiding both advantages (or disadvantages) that may distort competition.[1252] The competition functions of the arm's length standard is consistent with the EC' assurances that if the OECD Guidelines are followed, the result is *"unlikely"* to give rise to State Aid.[1253] This additional function of arm's length principle is consistent with the EC objective, i.e. fair competition in the internal market.

In summary, the notion that an organization's objective is relevant for identifying risk is valid for all enforcement authorities, as tax administrations, and the EC. The objective concept shows why the fiscal State aid risk, among other factors, is different from the other tax advantages since the EC's has different objectives than tax administrations, and State aid law has different objective from tax law. The objective concept sheds light on the possible different treatment of the same facts under a tax audit rather than a State aid investigation due to the institutional differences that characterise the investigating authorities, notwithstanding the investigation of the same amount of tax advantages.

411, 420; Michael Lang, 'Tax Rulings and State Aid Law', (2015) British Tax Review 391, 393–4; R. Szudoczky, 'Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms', (2016) EStAL 357, 363.

[1250] A. Bartosch, 'Is There a Need for a Rule of Reason in Europe State aid Law? Or How to Arrive At a Coherent concept of Material Selectivity', (2010) Common Market Law Review 47, 739-752.

[1251] R. Bonnici, 'The European Commission's Arm's Length Standard: Relationship and Compatibility with the Arm's Length Principle under Transfer Pricing', (2019) International Transfer Pricing Journal, pp.34, vol.3, 98.

[1252] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2017), para. 1.8

[1253] State Aid Notice, para. 173; WP DG Competition, para. 18.

4.4.5. The individual tax ruling' paradox: from dispute avoidance mechanism to dispute trigger (the risk of selectivity)

4.4.5.1. Individual tax ruling as apparent valuable instruments to avoid disputes

The EU JTPG affirmed that "*APAs are an exemplary method of dispute avoidance*".[1254] APAs and individual tax rulings in general are considered one of the most valuable legal instruments to provide legal certainty and legitimate expectations.[1255] While MNEs cannot entertain legitimate expectations merely on the basis that tax rulings were concluded with domestic tax authorities, an intuitive conclusion should be that tax rulings are irrelevant as regards State aid investigations. Lyal supports the aforementioned statement by arguing that "*It should be emphasized first of all that the mere existence of an advance tax ruling, of a system for granting tax rulings, or of legislation that envisages tax rulings, is entirely neutral from a State aid perspective*".[1256] Lagae lists different disadvantages in relation to the application of APAs within the EU without mentioning a possible "*disadvantage*" of being State aid trigger.[1257] Parada highlights that the GC approach puts at risk the advance legal certainty provided by tax rulings.[1258] Luja argues that "*If the tax authorities accept a tax position by a taxpayer after having looked into it and this turns out to be too advantageous and in violation of national law, it could amount to State aid even in the absence of any advance tax ruling (ATR) or advance pricing agreement*".[1259]

Effectively, the EC not only emphasizes that its investigations are not targeting the legal instrument of tax rulings as such,[1260] but also recognizes the importance of advance rulings as a tool to provide legal certainty to taxpayers.[1261]In the Guidelines for a Model for A European Taxpayer's Code, the EC clearly affirms that "*where an advance ruling system is in place, taxpayers*

[1254] Art. 2.4 of Communication from the Commission to the Council, the European Union Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Price arrangements within the EU, SEC (2007) 246/COM/2007/0071 final.

[1255] G.G. Portney, 'Letter Rulings: An Endangered Species?' (1983) 36 TAX LAW. 751, 754-55; M Rogovin, 'The Four R's: Regulations, Rulings, Reliance and Retroactivity', (1965) 43 TAXES 756, 765; C. Biz, 'Countering Tax Avoidance at the EU Level after 'Luxleaks': A History of Tax Rulings, Transparency and BEPS: Base Erosion Profit Shifting or Bending European Prospective Solutions?' (2015) 12 Diritto e Pratica Tributaria Internazionale 1035, 1040.

[1256] R. Lyal, 'Transfer Pricing Rules and State Aid', (2015) 38 Fordham Int'l L.J. 1017.

[1257] J.P. Lagae, 'Advance Pricing Agreements', (1999) EC Tax Review 1999-1. In the same vain, Waerzeggers and Hillier have highlighted many "*inherent risks associated with granting confidential advance tax rulings*" without mentioning the state aid risk. See C. Waerzeggers and C. Hillier, 'Introducing an Advance Tax Ruling (ATR) Regime: Design Considerations for Achieving Certainty and Transparency' (2016). Tax Law, Vol. 1, 67-98.

[1258] L. Parada, 'Amazon and the State Aid Tax Saga', (2022) Cahiers de fiscalité luxembourgeoise et europèenne 1; Cases T-816/17 and T-318/18, *Grand Duchy of Luxembourg, Amazon EU Sàrl and Amazon.com, Inc. v European Commission,* ECLI:EU:T:2021:252.

[1259] R. Luja, 'EU State Aid Law and National Tax Rulings: In-Depth Analysis for the TAXE Special Committee', (2015) P/A/TAXE/2015-02, 12.

[1260] European Commission, DG Competition Working Paper on State Aid and Tax Rulings, para. 5 (2016).

[1261] Ibid

can expect tax administration to provide certainty on the application of the law in a specific case".[1262] The TPF Forum considered that developing better practices on APA in the EU would be more worthwhile than any other dispute avoidance mechanisms (simultaneous tax examination, voluntary or mandatory prior consultation or agreement, expert opinion or mediation).[1263] Moreover "*a unilateral APA might still be preferable to a taxpayer than no APA of any kind*".[1264] The EC not only has repeatedly stated that individual tax rulings (such as APAs)[1265] are not problematic per se,[1266] but also it has encouraged member states to use APAs and other advance rulings as en-ante tax procedure to reduce the "*likelihood disputes",* and "*member states could be encouraged to introduce or expand bilateral or multilateral Advance Pricing Agreement programs; such instruments, although costly, are an effective means of dealing with the uncertainty relating to transfer pricing*".[1267]

It is argued that, under the EU State aid law framework, applying for tax rulings not only is neutral or reduce the risk of dispute, but on the contrary, it increases the risk of State aid disputes. This means that a TP transaction not agreed on tax rulings is less likely to be investigated than the same identical transaction covered by a tax ruling. It must be recalled that tax rulings are dispute avoidance mechanisms and their aim is to avoid - or reduce - the risk of dispute by providing legal certainty. Our hypothesis that tax rulings increase the risk of State aid dispute is limited to the risk of State aid law disputes. The other risk of disputes will not be taken into consideration. This means that there will not be provided managerial evaluation that balances the risk of State aid disputes with the less risk of tax disputes with domestic tax authorities. It is possible that the benefit provided by agreeing on APAs is worth the increased risk of dispute of State aid.

4.4.5.2. The increased discretion and the risk of selectivity

The State aid risks can be split into the risk of selectivity, the risk of advantage, and other State aid criteria. The risk of selectivity is the first risk analysis that will be assessed in case a TP arrangement is covered by a tax ruling. State aid rules boil down to the prohibition of

[1262] European Commission, Guidelines for a Model for a European Taxpayers' Code, Ref. Ares (2016) 6598744.
[1263] Communication from the Commission to the Council, the European Union Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures, para 11. See also Communication from the Commission to the Council, Guidelines for Advance Price arrangements within the EU, SEC (2007) 246/COM/2007/0071 final.
[1264] Ibid., para 19; Guidelines for Advance Price arrangements within the EU, Ibid.
[1265] The EC defines APAs as agreement between tax administrations encompassing an appropriate set of criteria for the determination of the transfer pricing for certain controlled transactions between taxpayers over a fixed period of time. See Communication from the Commission to the Council (n. 1263), para 2.4. See also Guidelines (n. 1263).
[1266] EC Notice on the notion of State aid 2016, para 160; Communication from the Commission, DG Competition, Working Paper on State aid and Tax rulings, 2016, para. 5.
[1267] European Commission, 'Company Taxation in the internal Market', EC Staff Working Paper, COM (2001) 582 final, p.356.

discrimination as a fundamental pillar of the internal market.[1268] Selectivity represents a discriminatory treatment. Assuming that all treatments have the same possibility of being qualified as State aid, more possibility of different treatments increase the likelihood of selectivity. In this regard, the discretion increases the possibility of threating comparable situations differently. Tax rulings are in their nature an occasion to apply discretionary power by the tax authority.[1269] Particularly, individual tax rulings can be selective when the exercise of that discretionary power extends beyond the simple management of tax revenue in accordance with objective criteria.[1270] A delegation system that allows the competent authority to freely choose the beneficiaries or to establish conditions inherent to the objectives of the tax system to be met can be selective (since it is not considered as general).[1271]

The CJEU takes the view that a certain degree of discretionary power is less likely to give rise to State aid, when it is based on additional burden to ensure an equal treatment versus a situation in which the discretionary power relates to the ability to award an advantage in favor of a certain undertaking.[1272] According to the CJEU, discretion that enables authorities to determine the beneficiaries of or the conditions under which a fiscal advantage is provided, implies that the measure is selective.[1273] Moreover, the landmark FIAT judgments affirmed that the EC must be able to establish that the parameters laid down by national law are manifestly inconsistent with the objective of "*non-discriminatory taxation"* of all resident companies, whether integrated or not, pursued by the national tax system.[1274]

The EC states that if a national administration enjoys room for discretion to grant a favorable tax measure, there is a presumption of selectivity.[1275] Another presumption of selectivity arise when tax rulings are not available under generally applicable member states' tax law, to

[1268] Szudoczky, The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation (IBFD, 2014), p. 469; Micheau, "Fundamental freedoms and State aid rules under EU law: The example of taxation", 52 Eur. Tax. (2012), at 210. Differently from fundamental freedoms, the scope of state aid rules encompasses also purely domestic situations when certain domestic undertakings are favoured over other also domestic undertakings – see e.g., Schön, "Taxation and State aid law in the European Union", 36 CML Rev. (1999), 911–936.

[1269] T. Nielsen, The Arm's Length Test: A Rule of Law – or an Excuse for Arbitrary Taxation? Intertax, 1979/8; A. Sugarman Norman, Tax Ruling Procedure Revisited, Wm. & Mary L. Rev. 9 (1967): 1011. S. Daly, Tax authority advice and the public 13 (2020). L. Eden, W. Byrnes, Transfer Pricing and State Aid: The Unintended Consequences of Advance Pricing Agreements, Legal Studies Research Paper Series, No. 18-45, 2018.

[1270] Case C-241/94, France vs. Commission, paras. 23 and 24.

[1271] Case C-6/12, P Oy, para 24, 26-27.

[1272] Case C-15/14 P, Mol Maygar Olaj és Gázpari Nyrt, para. 65.

[1273] C-256/97, DM Transport, para. 27 and the case-law cited there.

[1274] Joined Cases C-885/19 and C-898/19 P, Fiat Chrysler Finance Europe vs Commission, ECLI:EU:C:2022:859, 2022.

[1275] See Commission Notice on the application of the State aid rules to measures relating to direct business taxation, Official Journal C 384, 10/12/1998, paras 21 and 22. In that respect, the General Court stated as follows: "in order to preclude characterisation as a general measure (...) [i]t need only be established, as it has been in this case, that the administration has a discretionary power enabling it, in particular, to vary the amount of, or the conditions for granting, the tax concession in question according to the characteristics of the investment project submitted for its assessment", in GC, *Territorio Histórico de Álava - Diputación Foral de Álava, Ramondín SA v Commission of the European Communities*, Joined cases T-92/00 and T-103/00, para 35.

similarly situated companies.[1276] In State aid law, the discretionary power is likely to be selective.[1277] Measures that *prima facie* apply equally to all companies but nonetheless still are available through discretion of the public administration is more likely to be selective.[1278] Moreover, a certain level of discretion that shows the absence of a procedural consistency could be considered as a sufficient *prima facie* proof to switch the burden of proof on the member state.[1279]

The relevance of discretion for assessing individual measure can be found in one of the four conditions used by the GC to differentiate between "*ad hoc individual measure*" and "*individual measure applying an aid scheme*".[1280] The Regulation 2015/1589 is the legal basis that GC referred to when conducting its analysis for distinguishing individual aid from aid schemes.[1281] The Regulation defines individual aid as an aid not based on an aid scheme.[1282] Aid schemes are defined as acts serving as basis to, without additional implementing measures, grant individual aid to undertakings previously defined in an abstract and general form.[1283] In this regards, the GC acknowledged four conditions that have to be met for an aid to be considered an aid scheme: (i) there is a legal act establishing the basis for the granting of aid, or a *de facto* aid scheme; (ii) the elements which constitute the essence of the scheme are clear from the act and need no additional implementing measures; (iii) the national authorities do not have discretion in establishing the elements which form the essence of the scheme; and (iv) undertakings benefiting from the scheme are defined in an abstract and general form.[1284] Applying these four conditions, in *Fiat*, the GC decided that the tax ruling the tax ruling was classified as *ad hoc* individual aid.

Lang and Zeiler argue that as long as it is not so indeterminate as to grant the administration the freedom to favour certain undertakings based on criteria external to that framework, a degree of openness of a legal provision is not, however, problematic from a State aid perspective.[1285] Peters illustrates that the abuse of discretionary powers by the tax authorities in the process of monitoring the residual profit allocation of the taxpayers constitutes the

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[1276] European Commission., Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, 1998 O.J. (C 384) 3, 4

[1277] C-256/97, *Déménamgements-Manutention Transport SA (DMT*), ECLI: EU: C :1999 :332, para 27; Case C-6/12, *POy*, ECLI :EU :2013 :525, para 25; Outside the fiscal state aid case law, see inter alia: C-241/94, *French Republic v. Commission of the European Communities*, EcLI:EU:C:1996:353.

[1278] C-256/97 D*M Transport* (1999), ECLI: EU: C :1999 :442, para 27.

[1279] W. Haslehner and A. Ancora, 'The Apple State Aid Case', in M. Lang (ed), *CJEU Recent Development in Direct Taxation* (Linde 2019), 244; See also Case C-6/12, P, Ptv v Commission, ECLI:EU.C:2013:525, para 27.

[1280] *Fiat* (n 494), paras. 342–348.

[1281] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU [2015] OJ L248.

[1282] Ibid Art. 1.

[1283] Ibid Art 1 (d).

[1284] *Fiat* (n 494), paras. 342–348.

[1285] M. Lang and A. Zeiler, 'Discretionary Power of Tax Authorities as a State Aid Problem', in W Haslehner, G. Kofler and A. Rust (eds), *EU* Tax Law and Policy in the 21st Century (Kluwer 2017) 91, 98. They affirm that "every decision staying within the framework contemplated by the law is in line with [the requirements of] State aid law".

relevant State aid problem.[1286] Pursuant the *Gibraltar* case, Durando considers that selectivity may be present in every case where the limits of taxation have been conceived in an arbitrary way in order to favour certain products or certain undertakings.[1287] Consequently, a measure that provides more room for appreciation is more likely to entail a likelihood of selectivity.

4.4.5.3. The role of presumptions and the risk of selectivity

The allocation of the burden of proof and the role of presumptions are relevant arguments for the assessment of the State aid risk, particularly with regards to the choice of applying for an individual tax ruling. The assessment of State aid risk boils down in the presumption of selectivity, and correlated shifting of the burden of proof.

According to the CJEU, the burden of proof is on the EC, which is called to demonstrate the existence of State aid.[1288] This standard allocation of the burden of proof applies for both notion of advantage and selectivity.[1289] However, the CJEU allows for a restricted cases of exemption and the presumption of selectivity is one of them.[1290] The presumption of selectivity shifts the burden of proof onto the parties and allows the EC to demonstrate the selectivity analysis once it has demonstrated that an advantage has been granted.[1291]

In the current individual TP cases, and in the EU State aid notice, the EC has highlighted the presumption of selectivity.[1292] The EC support this presumption on the basis on the interpretation of the CJEU's decision in *MO*.[1293] According to the *MOL* case, in the case of

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[1286] C. Peters, 'Critical Analysis of the General Court's 'EU Arm's Length Tool': Beware of the Reflexivity of Transfer Pricing Law!', (2022) EC Tax Review, Vol. 31, Issue 1,30-49.

[1287] A. P. Dourado, *Governação Fiscal Global 186* (Almedina, 2017), p.65,66.

[1288] See Case C-438/16 P *Commission v France and IFP Énergies Nouvelles*, EU:C:2018:737, para. 111; C-559/12 P *, France* v *Commission*, EU:C:2014:217, paras 98 and 99.

[1289] Joined Cases C-278/92, C-279/92, and C-280/92 *Spain v Commission*, EU:C:1994:325, para. 20; Case C-482/99 *France v Commission*, EU:C:2002:294, para. 68.

[1290] See, *inter alia*, Case C-559/12 P *France v Commission*, EU:C:2014:217, para. 63. See also L. Hancher, 'The Role of Presumptions and the Burden of Proof in Recent State Aid Cases - Some Reflections', (2019) EUR. St. AID L.Q. 470.

[1291] Hancher ibid 473.

[1292] In the 1998 EC Notice, it was laid down that "*Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail. As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre which they sometimes enjoy support the presumption that such is at any rate their effect in some instances*". See also EC Decisions: *Amazon*, para. 399, *Apple*, para. 224, *Fiat*, para. 218, *Ikea*, para. 109, *Nike*, para. 81 *Starbucks*, para. 254. According to the GC, such measures (i.e., individual rulings) were not necessarily to be considered as selective: see T-219/10, *Autogrill v. Commission*, para 45; T-399/11, *Banco Santander v. Commission*, para 49; and the mere finding that a derogation from the common or "normal" tax regime exists cannot give rise to selectivity: The CJEU disagreed and ruled that such derogations can constitute State aid. See C-20/15 P and C-21/15 P, *World Duty Free Group/Banco Santander/ v. Commission*; Case C-648/19, *Nike European Operations Netherlands BV & Converse Netherlands BV v Commission*, EU:C:2016:777. See also Case C-15/14 *MOL*, EU:C:2015:362, para. 60 where the CJEU held that, in case of individual aid, selectivity can be presumed when the advantage has been found.

[1293] Judgment of 4 June 2015, C-15/14 *P Commission v MOL*, EU:C:2015:362; See also judgment of 26 October 2016, C-211/15 *P Orange v Commission*, EU:C:2016:798, para. 54.

individual measures, "*the identification of the economic advantage is in principle, sufficient to support the presumption that it is selective*".[1294] If an advantage has been granted, the measures would entail State aid and there would be no need to analyze if the selectivity criterion has been met. The CJEU has allowed the presumption of selectivity in other cases.[1295]

Scholars have confirmed the presumption of selectivity.[1296] Loewenthal argues that selectivity should be presumed when it can be established that an advantage was conferred on an individual undertaking.[1297] Bobby affirms that "*itis not logical to analyse whether selectivity is present in an advantage aimed at only a single taxpayer*".[1298] Rossi-Maccanico has the similar view since he argues that when reviewing individual ruling, the selectivity assessment becomes superfluous.[1299] Hancher started his State aid analysis on "*the role of presumptions and the burden of proof in recent State aid Cases […]"* by highlighting the role of likelihood: "*Some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature walking in Regent's Park was more likely that not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian*".[1300] An increased likelihood of selectivity, due to presumptions, implies an increased likelihood that State aid will be found.

The role of presumptions of selectivity and the allocation of the burden of proof comes down to asking who should bear the risk of losing the case.[1301] As regard the advantage, in the *Starbucks* case, the GC has confirmed the CJEU jurisprudence that the EC has the burden of proof in relation to substantiating the existence of State aid, in particular, at para 152, the GC states that "*the [EC] can identify an advantage within the meaning of Art. 107 (1) TFEU only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain the approximation*".[1302] In the *Amazon* case as well as in the *Apple* case, the GC affirmed that it

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[1294] Ibid, *MOL*, para 60.

[1295] Case C-332/18 *Mytilinaios Anonymos Etairia*, EU:C:2019:1065, paras 67–68; Case C-211/15 *Orange*, EU:C:2016:798, para. 53. See, also Bruno Stromsky, 'La Cour de justice de l'Union européenne confirme que constitue un avantage sélectif la prolongation, par le juge des référés, d'un contrat accordant à une entreprise un tarif préférentiel' (2020) 1 Concurrences 129, 129–130.

[1296] A. L. Bengt Jespersen, 'The Development of the Burden of Proof in MEOP Cases', (2019) Eur. St. Aid L.Q. 458.

[1297] M. Vekeman, 'Conference Report, State Aid and (In) Direct Taxation: Report on the 12th Frans Vanistendael Lectures', (2019) EC Tax Review 2019-4.

[1298] C. Bobby, 'A Method inside the Madness: Understanding the European Union State Ais and Tax Rulings', (2017) Chicago Journal of International Law, Volume 18, Number 1, pp.345-346.

[1299] P. Rossi-Maccanico, 'A New Framework for State Aid Review of Tax Rulings', (2015) Eur. St. Aid L.Q. 371.

[1300] See L. Hancher, 'The Role of Presumptions and the Burden of Proof in Recent State Aid Cases—Some Reflections' (2019) 4 EStAL 470, 473, and the quotation cited therein: Lord Hoffmann in *Secretary of State for the Home Department v. Rehman* [2001] UKHL 74, [2003] 1 AC 153 [55].

[1301] F. Castillo de la Torre and E. Gippini-Fournier, *Evidence, Proof and JudicialReview in EU Competition Law* (Elgar 2018). Chapter 2. E. Gippini-Fournier, The Elusive Standard of Proof in EU Competition Cases (2010) 33 World Competition, Issue 2 187, 207, P Hellstrom, 'A Uniform Standard of Proof in Competition Proceedings' (2019) in CD Ehlermann and M Marquis (eds), *European Competition Law Annual* (Hart Publishing 2009), and A. Kalintiri, *Evidence standards in EU competition enforcement: The EU Approach* (Hart Publishing 2019).

[1302] Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Starbucks v European Commission*, ECLI:EU: T:2019:669, paras 152 and 199.

is not sufficient for the EC to prove that a methodological error was made when applying a particular TP method, it is for the EC to demonstrate the existence of an advantage.[1303]

Under the State aid law, four major criteria that have to be met. Firstly, the "*state resource requirement*" is met in fiscal cases, since the reduction of tax - for the beneficiary – results in a loss of tax revenue that would otherwise have been available to the concerned member state.[1304] The distortion on competition has been presumed when the selective advantage has been met.[1305] If the beneficiary received an advantage which its competitors did not receive then the beneficiary's competitive position has been improved by the measure and competition has been distorted.[1306] The CJEU role is to verify whether the evidence relied on by the EC is consistent, factually accurate, while also establishing whether that evidence contains all the information which must necessarily be taken into account to assess the investigated facts and whether that evidence is capable of substantiating the conclusions drawn from it.[1307]Advantage and selectivity are indeed two of most important criteria that the EC has to demonstrate.[1308] However, when taxpayers apply for an APA, the EC does not have the burden to demonstrate the selectivity, which, among all State aid law criteria, is the most difficult to demonstrate.[1309]

The elimination of the burden of the proof of selectivity not only will be relevant before the CJEU but may also affect the EC decision to start investigations in a more targeted fashion. As reported in a round table of the OECD about presumption and burden of proof, "*presumptions are a widespread and useful device to save resources in circumstances where a particular fact can be inferred from common sense or from prior experience; or where a particular fact should be proven or disproven*

[1303] GC Decision in *Apple*, para 333 and paras 216 and 319.

[1304] Case C-87/77 *Van Tig*gele [1985] ECR 1-02523, [24-25], Case C-2 15/81 *Flesihkontor* [1982] ECR 1-03583, [22]; Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR 1-00887, [21]; see also C Quigley QC, *European State Aid Law and Policy* (3rd edition, Bloomsbury 2015), 34; European Commission Decision *Starbucks*, para 226, European Commission Decision on *Apple*, para 221.

[1305] See, for example, Case C-72/03 Heiser [2005] ECR 1-01627, Case 730/79 *Philipp Morris* [1980] ECR 1-02671. See, on the contrary, A. Giraud and S. Petit, 'Tax Rulings and State Aid Qualification: Should Reality Matter', (2017) Eur. St. Aid L.Q. 233.

[1305] European Parliament Press Release, 'Parliament Sets Up a Special Committee on Tax Rulings' (Feb. 12, 2015).

[1306] European Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] (2016/C 262/01) JOCE C262/2016**:** "*for aid to be considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations*."

[1307] Case C-525/04 P *Spain v Lenzing*, EU:C:2007:698, para. 57; Case C-73/11 P *Frucona Kosice v Commission*, EU:C:2013:32, para. 76 ; C-405/11 P *Commission v Buczek Automotive*, EU:C:2013:186, para. 49; Case C-300/16 P *Commission v Frucona Kosice* ˇ , EU:C:2017:706, para. 65. In this analysis, the economic content plays a fundamental role. See, for example, Case T-791/16 *Real Madrid Club de Fútbol v Commission*, EU:T:2019:346, paras 72, 76–78, 114–116, 125–129. According to the Court, the court review is limited to a manifest error of assessment. Case C-73/11 P *Frucona Kosice v Commission* , EU:C:2013:32, paras 74-75.

[1308] Joined Cases T-239/04 and T-323/04 *Italy and Brandt Italia SpA v Commission*, EU : T :2007 :260, para. 119 ; Case T 425/11 *Greece v Commission*, EU:T:2014:768, para. 42; Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission*, EU:T:2007:253, para. 34; Case T-305/13 *SACE and Sace BT* v *Commission*, EU:T:2015:435, para. 95.

[1309] Offermanns argues that the presumption on selectivity implies that it is up to the Member State to prove that the same advantage would have been granted to any other undertaking in the same legal and factual position: See Symposium on State Aid, European Taxation, IBFD, April 2017.

by the party which has better access to the relevant evidence ('proof proximity'); or where a particular fact should be presumed in order to increase enforcement effectiveness - usually to remedy the claimant's difficulties in gathering evidence".[1310] In light of the declared approach of a "*Less and better targeted State aid*",[1311] it will be likely that the EC will start investigations where are the "*enforcement effectiveness*" will be more as the chance to win the case will be also more. Therefore, applying for an individual tax ruling should be taken into consideration since they increase the risk of State aid, and they can be considered as a fiscal *State aid hallmark*s.

4.4.6. The Bespoke Reference System as Fiscal State Aid Hallmark (The Risk of Selectivity)

The selection of the right reference system is one of the most uncertain legal aspects of state aid assessment particularly for the selective advantage.[1312] Rather than abandon hope in the pursuit of certainty for finding the absolute general reference system – which does not exist for all cases - or compare this situation to a jellyfish,[1313] a State aid risk assessment based on the notion of selectivity can be performed. Which reference system is most likely to make our tax position selective?

By following a strict interpretation of Forum 187, an "*EU arm's length standard*" - applied as an allocation benchmark - would require a taxation of profit at a level close to the standalone companies' profit. The likely result will be that the tax ruling will be considered selective, irrespective of whether that ruling is part or not of a more generally applicable reference system.[1314] On the contrary, by following an extensive interpretation of the Forum 187, assuming that tax rulings can be part of the reference system, the simple demonstration of the advantage will not be enough to determine illegal State aid. In this later case, only to the extent that the whole system favours group companies would give rise to illegal State aid.[1315] In fiscal State aid cases, the reference framework is the relevant "tax system", which is defined and

[1310] OECD Report on Revised Section E on Safe Harbors in Chapter IV of the Transfer Pricing Guidelines, 2013, pp. '8-13. http://www.oecd.org/competition/safe-harbours -and-legal-presumptions-in-competition-law.htm> accessed 5 December 2019. See also C Ritter, 'Presumptions in EU Competition Law' (2017), <https://ssrn.com/abstract=2999638>, accessed 5 December 2022.

[1311] State Aid Action Plan: "Less and better targeted State aid": a roadmap for State aid reform 2005-2009, APPENDIX 7, Code of Best Practice for the conduct of State aid control procedures, 2005.

[1312] Cf. 3.3.4.

[1313] Bartosch states that "*in the very moment you have reached a level of sufficient confidence to finally grasp it, it slips out of your hands again"*, see A. Bartosch, 'The Apple Ruling or the Destruction of the Ring to Bind Them All' (2020) 19(3) Editor's Note in European State Aid Law Quarterly 249.

[1314] R. Luja, 'State Aid Benchmarking and Tax Rulings: Can We Keep It Simple?', in I. Richelle, W. Schön and E. Traversa (eds), *State Aid Law and Business Taxation*(Springer, 2016), 119.

[1315] In this particular scenario, the EC is not required to assess every ruling individually: *See* Judgement of 14 October 1987, C-248/84, *Germany v Commission*, ECLI:EU:C:1987:437, para 18

structured in accordance with the choices made by a member state.[1316]Regarding Fiat's appeal, the Advocate-General suggested that the GC correctly held the EC was not required to consider the intra-group and cross-border elements of the effects of the tax ruling when determining whether that ruling conferred an advantage.[1317] In view of these premises, if our tax position is supported by a bespoke reference system, then it is more likely that this tax position can be considered selective. Thus, if the tax administration supports that the individual tax ruling (or individual tax position) should be considered as a reference system in its own right, then it is much more likely that the tax ruling is selective. Conversely, if the reference system is the general tax law, this tax position is less likely to be regarded as selective. Therefore, a tax ruling that is supported by a bespoke reference system can be regarded as *State aid hallmark*s.

4.4.7. Fiscal State Aid Hallmarks Between the TP Methods

The EC has clearly formulated that when TP transactions are compliant with the OECD arm's length principle that transaction is "*unlikely*" to be qualified as State aid.[1318] This statement is one of the rare occasions where the EC explicitly expresses the concept of likelihood applied to State aid law. It must be recalled that the likelihood is not an expression of certainty, which means that if the TP comply with international standards, such as the OECD TP Guidelines, it is not certain that the transaction is compliant. However, it is less likely that a TP transaction, which is compliant with the OECD arm's length standard, will be qualified as State aid. More specifically, how the arm's length standard is built and what are the methods to reach arm's length standard results?

Among the several steps of which the arm's length standard is composed, the choice of the TP method has been one of the most debated and analysed ones. Moreover, it seems that for both the CJEU and the EC the choice of TP method matters and it may have an impact on the State aid compliance, therefore, on the State aid risk assessment. [1319]

[1316] Joined Cases C-885/19 and C-898/19 P, *Fiat Chrysler Finance Europe vs Commission*, ECLI:EU:C:2022:859, para 122. H. Drabbe, 'The Test of Selectivity in State Aid Litigation: The Relevance of Drawing Internal and External Comparisons to Identify the Reference Framework' in A. Rust and C. Micheau (eds), *State Aid and Tax Law*, (Wolter Kluwer) 2013), 87–105, 103); European Commission, Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014), Eu Publishing, para 134.

[1317] Case C-885/19 P *Fiat Chrysler Finance Europe v Commission* and Case C-898/19 P *Ireland v Commission*, Advocate General Opinion, para 72.

[1318] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, para. 173; WP DG Competition para. 18. For an introduction on the arm's length standard, see Cpt: 3.3.3., 3.3.4.

[1319] C-529/16, *Hamamatusu Photonics Deutchland GmnH v. Hauptzollamt Munchen*, ECLI:EU:C:2017:984, paras 26-30, where the CJEU seems to prefer direct methods. The EC's preference will be explained in more detail in the following parts.

In the current State aid investigations on tax rulings, the EC challenged the TP methods chosen by taxpayers and endorse by the tax authorities.[1320] The GC has not precisely clarified whether the "*methodological errors*" is decisive. In *Starbucks*, at para 152 the GC affirms "*only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation*", and at para 201 "*mere non-compliance with methodological requirements does not necessarily lead to a reduction of the tax burden*".[1321] In *Apple*, the GC held that the mere presence of methodological inconsistencies and inaccuracies was not sufficient to prove the existence of State aid.[1322] The *ex-post* EC investigation and its unrealistic standard of sophistication as regards profit allocation may leave EU taxpayers and tax administration in a perpetual uncertainty.[1323] However, for the purpose of the State aid risk analysis, the point is not about whether a methodological choice is decisive or not, or it entails a certain EC investigation, but it is relevant to assess whether there are TP methods that are riskier than others for State aid purpose. In light of State aid law, is there a possible order of preference in choosing the TP method to reduce the risk of disputes?

This section develops several arguments to explain why some methods are riskier than others. The analysis of the different level of risks stems directly from the application of the law,[1324]and from all pieces of information provided by the EC and GC.[1325] The possible implications of domestic law and the implementation of tax treaty law are outside the scope of this analysis. Under the framework of TP method's choice and its State aid risk of dispute boils down on two different sub-risks: the risk of selective advantage and the risk of distort competition.

Before assessing the State aid risk and the choice of the TP method, a general introduction of TP method will be provided. The selection of the TP method is one of the fundamental steps of the TP analysis to produce more reliable arm's length results.

The TP analysis may be divided in two macro-steps: i) accurate delineation of a controlled transaction, ii) a comparison to the conditions and economically relevant circumstances of comparable transactions, the so-called comparability-analysis. This analysis is part of the process of selecting and applying the most appropriate TP method and aims at finding the most reliable comparable. To test whether two transactions are comparable, the TP guidelines

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[1320] In the *Fiat* case, the EC challenged the way in which the method was applied rather than the selection of the method. Case T-755/15, and 759/15. See also R. Szudorsky, 'FIAT- Non-confidential version of decision on selective tax advantages for Fiat in Luxembourg. State aid. EU Commission, Highlights T& Insights on European Taxation 2017/2,.159; A. Pantazatou, 'Taxpayers' fundamental rights and the Fiat case', in M. Lang, P. Pistone, A. Rust, J. Schuch, C. Staringer and A. Storck(eds.) *CJEU: Recent Developments in Direct Taxation 2019* (Linde, 2020).

[1321] Joined Cases T-760/15 and T-636/16, *Kingdom of the Netherlands and Starbucks v European Commission*, ECLI:EU:T:2019:669, para 152 and 201. See also paras 196, 498, 512.

[1322] T-778/16 & T-892/16, *Ireland v. Commission*, paras. 352-417.

[1323] Haslehner and Ancora (n. 1284)235.

[1324] J. Monsenego, 'Selectivity in State Aid Law and the Methods for the allocation of the Corporate Tax Base', (2018) Eucotax, Kluwer Law, 124.

[1325] From the substance perspective every method can be more reliable than others. See the SWOT analysis published in EC, 'Study on the Application of Economic Valuation Techniques for Determining Transfer Prices of Cross Border Transactions between Member of Multinational Enterprise Groups in the EU', TAXUD/2014/CC/126, Final Report, 75.

develop a nine-step process, and the choice of TP method is one the steps.[1326] It must be pointed out that the comparability analysis is not a linear process and certain steps may need to conducted repetitively until the most suitable method is found.[1327] The TP guidelines distinguish five major TP methods for the determination of the arm's length prices. These methods are dived into two categories, the traditional transaction methods and the transactional profit split methods. Traditional transaction methods are: i) comparable uncontrolled price method, ii) resale price method, iii) cost plus method. The transactional profit methods are the transactional net margin method and the Profit Split Method.

Traditional transaction methods are considered as the most direct means of establishing whether conditions between associated enterprises are arm's length. When the traditional transaction method and the transitional profit method can be applied in an equally reliable manner, the traditional transaction methods have to be preferred.[1328] Only when the information available on uncontrolled comparable transactions is not sufficient enough for the application of the transaction methods, MNEs may consider the application of the transactional profit methods.[1329]

The division into "*traditional*" and "*transactional*" is not the only way into which TP methods can be categorized. There are two more possible categories that will provide valuable insights from the relation to the choice of the method in light of State aid risk of investigations. TP methods can also be divided into "*direct*" and "*indirect*", and in "*one-sided*" and "*two-sided*".

TP METHODS	Historical category	Category based on directness	Category based on the analysed sides
Comparable uncontrolled price (CUP)	Traditional transaction method	Direct	Two-sided[1330]
Resale Price Method	Traditional transaction method	Indirect	One-sided
Cost Plus Method	Traditional transaction method	Indirect	One-sided
Transactional net margin method (TNMM)	Transactional profit method	Indirect	One-sided
Profit Split Method	Transactional profit method	Indirect	Two-sided

[1326] The nine-step process is composed by: 1) years to be covered, 2) taxpayers' circumstances, 3) understanding the controlled transaction, 4) review of the existing internal comparables, 5) determination of available source of information on external comparables, 6) identification of the most appropriate TP method, 7) identification of potential comparables, 8) comparability adjustments, 9) arm's length range: see TP Guidelines (para 34 in Chapter III).
[1327] TP Guidelines, para 3.5. in Chapter III.
[1328] TP Guidelines par 2.14 in Chapter II.
[1329] TP Guidelines par 2.14 in Chapter II.
[1330] UN TP Guidelines, para-B. 3.2.3. "Strengths and Weaknesses of the CUP method", 158.

In the following sections we will present why "*direct*" method is less risky than "*indirect*" and why "*two-sided method*" is less risky than two-sided.

4.4.7.1. Direct Method: The Departure from Competition as a Fiscal State Aid Hallmarks (The Risk of Distortion on Competition)

Before proceeding to examine the direct method in light of State aid law, it is important to clarify what does it mean "*direct method*". Differently from the other TP methods that compare costs and profits, the CUP method is the only method that compares price directly. The CUP method compares prices charged for property or services transferred in a controlled transaction to the prices charged for property and services transferred in comparable uncontrolled transactions in comparable circumstances.[1331] When performing the comparability analysis, MNEs may either rely on internal or external comparison.[1332] The method is suitable when the same or similar property or service is sold between related companies and stand-alone company.[1333] The CUP method is also used with respect to royalties, interest rates, and service fees.[1334] The TP Guidelines acknowledge that it may be difficult to find uncontrolled transactions that are sufficiently similar to the controlled ones.[1335] That is why to consider the comparability as a valid test, the CUP method does not require identical property or service. Comparability adjustments are allowed to achieve reliable results.[1336]

Having defined the CUP method, we will now move to discuss whether the method should be preferred to reduce the risk of State aid disputes. Before analyzing the current case, it is important to extrapolate what the OECD TP guidelines suggest.

Although the TP guidelines precisely affirms that no one method is suitable in every possible situation, the guidelines show a precise order of preference.[1337] The CUP method is the most direct and reliable way to apply the arm's length standard, because it focuses directly on the price of a transaction and requires both functional and product comparability. Therefore, the

[1331] TP Guidelines, para 2.13 in Chapter II.
[1332] External comparables are considered the independent enterprises that sell or buy a particular product in similar quantities and under similar terms and circumstances in comparable quantities and markets. Internal comparables are considered the associated enterprise that buy or sell a particular product form or to an unrelated party in similar quantities and under similar terms and circumstances in comparable quantities and markets. See para 3.27, TP Guidelines, Chapter III.
[1333] TP Guidelines, para 2.18 in Chapter II.
[1334] O. R. Hoor, *Transfer Pricing in Luxembourg*, (Legitech, 2018), 94
[1335] TP Guidelines, para 2.15 in Chapter II.
[1336] TP Guidelines, para 2.13 in Chapter II. See also C. Kratzer, 'Transfer Pricing Methods', in G. Green, *Transfer Pricing Manual*, (BNA International Inc., 2008), 24.
[1337] Direct Method is the method that compare price directly. The other methods compare profit, margin, cost to indirectly determine price. TP Guidelines para 2.14 in Chapter II.

OECD Guidelines state that the CUP method is preferable over all other methods if it is possible to identify comparable uncontrolled transactions.[1338]

The EC agreed with the OECD TP guidelines by pointing out that the use of a particular TP method provides a more reliable method to approximate a market-based outcome than others do.[1339] It seems that the EC suggests the CUP method as the less risky ones since this method sets prices by making "*direct*" comparisons with the price charged on the market for the same goods or services. The EC and OECD preference may be sufficient ground to consider why the choice of the CUP method is the preferable choice to reduce the risk of State aid dispute. Nevertheless, other arguments will be developed to explain the degree of risk related to method's choice, and above all why the CUP method is the less risky one.

The *Starbucks* case is the example where the EC argues that the APA deviates from the arm's length standard since the Netherland's tax authority endorsed the use of the TNMM method, whereas the CUP method would have produced a more reliable approximation of a market-based outcome.[1340]

A review of the general fact will be helpful to understand the case at stake. The *Starbucks* case concerns an APA concluded between the Netherlands Starbucks Manufacturing EMEA BV (hereinafter SMBV), an enterprise incorporated in the Netherlands and controlled by the Starbucks Corporation. [1341] The APA sets out that SMBV will be taxed for profits equal to a markup of 9 – 12% of the relevant cost base. Moreover, the SMBV's cost base does not take account of the costs of coffee beans (supplied by the Swiss subsidiary) and the royalty paid to Alki (the UK subsidiary) for the coffee-roasting know-how. The Dutch tax authority confirmed the TNMM method by concluding that the SMBV's intra-group transactions were in line with the arm's length principle.

In its Decision, the EC affirmed that TNMM was not the most appropriate method for estimating the taxable profit of SMBV as the least complex entity in the transaction was not SMBV but Alki LP. The CUP method should have been used. That would have required the identification of SMBV's controlled transactions, namely the royalty payment by SMBV to Alki LP, the payment for the coffee beans by SMBV to the Swiss subsidiary, and the finding of comparable uncontrolled transactions for them. In the case direct comparable were available, the method permits to comparing the functions performed by SMBV. As regards the royalty payment, the EC pleaded that the application of the CUP method would have led to the result that royalty almost null.[1342] As regards the price paid for the coffee beans to the Swiss subsidiary, the EC stated that the price was too high compared to what would have paid

[1338] TP Guidelines para 2.14 in Chapter II.
[1339] DG Competition Working Paper, para 19.
[1340] EC final decision on *Starbucks*, paras 299 and 445.
[1341] EC Final Decision on *Starbucks*, paras 40-58.
[1342] EC Final Decision on *Starbucks*, para 290.

in an uncontrolled transaction.[1343]All in all, the application of the CUP method would have determined a more reliable approximation of a market based outcome that the TNMM, and by accepting the TNMM the Netherland's tax authority granted a selective advantage.[1344] In a second line of reasoning, the EC argued that, even if the TNMM can be considered the right choice, it was applied incorrectly due to the wrong identification of the SMBV's functions, and the use of operating expenses as a profit level indicator was also incorrect.

According to both Starbucks and the Netherlands, the EC never showed that its own method was better than one the Netherlands has used.[1345] As the TP guidelines suggest, no method is suitable in every situation and in *Starbucks* the General Court confirmed that the choice of a TP method does not, as such, imply an illegal State aid, since the methods described in the OECD TP guidelines, all aim at implementing the same principle.[1346] The EC shall verify "*whether the methodology accepted by the Netherlands tax administration via the APA […] departed from a methodology that result[s] in reliable approximation of a market-based outcome, and therefore, from the arm's length principle*".[1347] Whether or not the EC's assessment is correct or not cannot be answered due to the necessity of having access to mostly confidential data and a lack of availability of information on the MNE concerned.[1348]

However, something that can be done is testing whether one method is riskier than others, and therefore, the choice of one method rather than others implies a major probability of being investigated under State aid law. The choice of a TP method does not, as such, imply an illegal State aid. However, the choice of a TP method, as such, implies a higher risk of being investigated under State aid law.

We argue that the CUP method is the less risky method for two main reasons:

- Firstly, as mentioned above, the CUP method is the OECD and EC preferred choice. This information is formally expressed by both the OECD and the EC. This means that whenever is applicable, taxpayers should apply the CUP method to reduce the risk of disputes.
- Secondly, the CUP method is the only method that compares price directly. The direct comparability based on price requires that comparables shall be competitors. Although the OECD and EC's preference about the method coincides, the notion of competition is the basis that differentiates why under State aid law the CUP method

[1343] EC Final Decision on *Starbucks*, para 349.
[1344] T.G. Iliopulos, 'The State Aid Cases of Starbucks and Fiat: New Routes for the Concept of Selectivity?', 2021 European State Aid Law Quarterly (EStAL), Volume 16, Issue 2, 263 - 271.
[1345] Case T-760/15, Action for Annulment (Dec. 23, 2015), *Netherlands v. Commission*, 2016 O.J. (C 59) 50; Case T-636/16, Action for Annulment (Sept. 5, 2016), *Starbucks and Starbucks Mfg. Emea v. Commission*, 2016 O.J. (C 462) 25.
[1346] EC Final Decision on *Starbucks*, paras 202, 209 and 211. For a similar view, see J. Monsenego, *Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base* (Wolters Kluwer 2018) 125.
[1347] T-760/15 & T-636/16*The Netherlands v. Commission*, para. 38.
[1348] A. Miladinovic and R. Petruzzi, 'The Recent Decisions of the European Commission on Fiscal State Aid: An Analysis from a TP Perspective', (2019) International Transfer Pricing Journal 252.

should be the preferable method to reduce the risk of distortion on competition and therefore to reduce the risk of State aid dispute.

Before analyzing why the CUP method is the less risky method, and why the comparability based on competitors provides more reliable results, it is important to highlight the context and the legal framework of State aid law and its relation to the competition.

State aid law is enshrined in the EU competition law.[1349] According to the Art. 107 TFEU and CJEU jurisprudence, "*distorts or threatens to distort competition […] in so far as it affects trade between member states*" is one of the criteria that has to be fulfilled to qualify a measure as incompatible State aid.[1350] Although "*distort competition*" and "*affects trade between member states"* are two distinct concepts, they are often treated jointly in the assessment of State aid as they are, as a rule, considered inextricably linked.[1351] When trade is affected, then competition is found distorted. Moreover, the "*distortion of competition*" is also considered inextricably linked to the "*advantage*", since whenever the economic benefit is provided, the financial situation of the undertaking is improved because of State intervention.[1352] State aid law appear to be intrinsically linked with the concept of competition and competitors.

However, some authors support the idea that the State aid analysis, and particularly the selectivity, should be assessed irrespectively of the degree of competitiveness.[1353] Michau highlights two approaches to assess the comparability test on which the selectivity is based: the "*objective-oriented*" and the "*economic-oriented*". She supports the idea that the "*economic-approach*" (namely the comparability based on competitors) shall not be used because, among others, it neither applied by the Court of Justice nor by EC.[1354] Effectively, in its case-law the CJEU has established the selectivity by reference to a tax system's objective rather than the

[1349] State aid rules are enshrined in the Part Three, Title VII: Common rules on competition, taxation and approximation of laws. See also F. Y. Jenny, 'Competition and State Aid Policy in the European Community', (1994) Fordham International Law Journal 18, No. 2, 525-554.

[1350] Consolidated version of the Treaty on the Functioning of the European Union – Part Three: Union Policies and Internal Actions – Title VII: Competition Rules on Competition, Taxation and Approximation of laws - Chapter 1: Rules on competition - Section 2: Aids granted by States - Article 107 (ex-Article 87 TEC).

[1351] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), para 186; Joined Cases T-298/97, T-312/97, *Alzetta and Others v Commission*, ECLI:EU:T:2000:151, para 81. Judgment of the Court of Justice of 14 January 2015, C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 66; Judgment of the Court of Justice of 8 May 2013 Joined Cases C-197/11 and C-203/11, *Libert and others,* ECLI:EU:C:2013:288, para 77; Judgment of the General Court of 4 April 2001, T-288/97, *Friulia Venezia Giulia*, ECLI:EU:T:2001:115, para 41. One of the limits is that the effect on trade between Member States cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort competition and is liable to have an effect on trade between Member States, based on the foreseeable effects of the measure. See Judgment of the General Court of 6 July 1995, Joined Cases T-447/93, T-448/93 and T-449/93, *AITEC and others v Commission*, ECLI: EU:T:1995:130, para 141.

[1352] A. Ezrachi, *EU Competition Law - An analytical analysis to the leading cases*, (Hart Publishing, 2016), 641.

[1353] C. Micheau, Tax Selectivity in European Law of State Aid - Legal Assessment and Alternative Approaches (September 22, 2014). University of Luxembourg Law Working Paper No. 2014-06.

[1354] W. Haslehner highlight also the fact that the CJEU and the EC do not apply the "competitive relationship" to assess the selectivity. See W. Haslehner, 'Transfer pricing rules and State aid law', in C. HJI Panayi, and others (eds), *Research Handbook on European Union Taxation Law*, (Elgar, 2020), 442.

competitive relationship between the undertakings.[1355] In the *Adria-Wien Pipeline* case, the CJEU analysed whether the measure would favour certain undertakings "*in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question*".[1356] In the *British Aggregates* case, the Court held that "*it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation*".[1357] In 1998, the EC published the EC Notice where it confirmed that a measure is selective if it constitutes *"an exception to the application of the tax system*".[1358]

The comparability test is also one of the fundamental steps to assess the advantage. The "*reference system*" or the "*normal market condition*" is the point of departure to scrutinise the comparability in order to determine whether a measure grants a selective advantage. It represents the normal situation governed by "*market forces*" before the state intervention.[1359] Also, under the advantage criterion, it appears unclear whether the advantage should be measured against competitors or not.

If the "*normal market condition*" is irrespective of the competitors, the comparability test does not compare the position of one undertaking with other undertakings (competitors) but compare the position of the investigated undertaking with the existing position of the same undertaking before the State intervention. In this case, the competitors are irrelevant to assess the advantage. According to the EC: "*the notion of advantage is based on an analysis of the financial situation of an undertaking in its own legal and factual context with and without the particular measure".*[1360]

However, in some circumstances and depending on the legal measure, the CJEU has interpreted the "*normal market condition/reference system*" by assessing the comparability on the position of the competitors, which represent the "*normal*" one.[1361] Accordingly with EC: "*a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes*".[1362] Scholars highlight that State aid policy is driving a new way of reasoning about the role of the member state, where the difference between "*good*" and "*bad*" forms of government is determined according to what is good or bad for competition.[1363]

[1355] Case C-127/07, *Société Arcelor*, para 36: "as regards the comparability of the sectors in question […] the possible existence of competition between those sectors cannot constitute a decisive criterion".
[1356] Case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer*, para 41.
[1357] Case C-487/06 P, *British Aggregates Association*, para 82.
[1358] Commission Notice on the application of the State aid rules to measures relating to direct business taxation, Official Journal C 384, 10/12/1998, para 16.
[1359] P. Rossi-Meccanico, 'The fiscal aid goes global', (2007) EC Tax Review, 2007/3, 136.
[1360] Commission Notice on the notion of State aid as referred to in Article 107(1), adopted 19/05/2016, C(2016)2946, para 72. See Case C-206/06, *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraphs 69 to 75.
[1361] P. Nicolaides and A. Metaxas, 'Asymmetric Tax Measures and EU State Aid Law', (2014) Eur. St. Aid L.Q. 51.
[1362] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), para187.
[1363] See the whole analysis from neoliberal rationality to the use of standardized forms: L. Nyberg, 'Market Bureaucracy: Neoliberalism, Competition, and EU State Aid Policy', (2017) Lund Political Studie. As regards the distinction between

For example, in the context of the Services of General Economic Interest (SGEI), the Court has repeatedly held that undertakings do not enjoy an advantage when a state measure is a compensation in order to provide a public service obligation provided by the recipient undertakings.[1364] Consequently, the measure does not have the effect of putting them in a more favorable competitive position than the undertakings competing with them.[1365] However, in order for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied, namely the Altmark conditions[1366]. The recipients are receiving an aid but from the effect perspective, they will not be enjoying any real advantage for the purposes of Article 107(1) of the Treaty because the only effect of the tax will be to put competitors on an equal footing.

In the *Deutsche Post* case, the General Court interprets the notion of the advantage in relation to the undertaking's competitors: "*It is therefore solely by comparison with the competitors of the undertaking in question that the advantage must be assessed[…]Furthermore, the logic behind the recovery of unlawful aid is that the beneficiary loses the advantage which it had enjoyed on the market by comparison with its competitors and that the situation existing before the grant of the aid is restored*".[1367]The basic concept behind is that normal market competition ensures that firms do not charge prices higher than those their competitors do.[1368] What is fundamental to highlights is that that in previous cases the need of finding comparable competitors is contrived by the legal context itself. It is the rules that request a comparability against competitors. Therefore, when domestic law requires comparability against competitors, the CJEU has held competitors as the normal market condition.

As regards the selectivity criterion, Lang suggests that alternatively the comparability can be established by reference to the "*degree of competition*" of entities.[1369] One of the points is that MNEs and standalone entities may be in competition, same as a Starbucks coffee shop can be

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good and bad State aid, see M. Blauberger, Of 'Good'and 'Bad' Subsidies: European State Aid Control through Soft and Hard Law 32 (2009) West European Politics 719.

[1364] For more information, see Art. 14 of TFEU, and Consolidated version of the Treaty on European Union – Protocols – Protocol (No 26) on services of general interest, Official Journal 115, 09/05/2008 P.0308 -0308.

[1365] See, to that effect, Case C-53/00, *Ferring SA,* ECLI:EU:C:2001:627, paragraph 27; Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, para 87.

[1366]Case C-280/00 Altmark para 88; Case C-451/03, *Servizi Ausiliari Dottori Commercialisti*, ECLI:EU:C:2006:208, para 61; In particular, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligation. According to the fourth criterion laid down by the *Altmark* judgment, where the undertaking which is to discharge public service obligations, in a specific case, it is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

[1367]Case T-143/12, *Germany v Commission* ECLI:EU:T:2016:406, para 112 and 108. See also Case T-157/2001, *Danske Busvognmænd v Commission*, ECLI:EU:T:2004:76, para 57.

[1368] P. Nicolaides and M. Kleis, 'Where is the advantage', (2007) Eur. St. Aid L.Q. 615.

[1369] M. Lang, 'Europäisches Beihilferecht und Besteuerung – am Beispiel des § 8c KStG', in Lüdicke (ed) *Praxis und Zukunft des deutschen Internationalen Steuerrechts*. (Dr. Otto Schmidt, 2012), 85–115; M. Lang 'Das Gibraltar-Urteil des EuGH: Neue beihilfenrechtliche Vorgaben für das Steuerrecht?' (2011) ÖStZ 24,593–600.

in competition with other coffee bars. In this sense, the comparability between standalone and MNEs is correlated to their degree of competition. Haslehner highlights that if the comparability of stand-alone companies with MNEs were confirmed, it would not necessarily result in an alignment of tax rules with economic reality.[1370] The reason behind this confirmation is based on the studies that suggest that the arm's length standard is not the perfect standard to assess the profits of MNE since ignores any benefit that results from the integration.[1371] It must be pointed out that, arguments that criticize the arm's length standard and is ability to assess the profit of MNEs does not necessarily imply that they criticized the arm's length standards as a tool to demonstrate selectivity.[1372] In this regards, when a member state has implemented the arm's length standard into domestic law, all stakeholders are required to comply with the essence of the arm's length standard in order to strive an equal treatment between stand-alone and MNEs. Due to the complexity and inherent imprecision of the arm's length standard, the strived equal treatment cannot be perfect. That is why the EC focuses on cases where there is a "*manifest breach*" of the arm's length standard.[1373]

The comparability based on the degree of competition could not be used as a general rule to establish the identification of the correct comparable undertakings, but it should be used only when is required by the reference system, that is, the rules applicable to the case.[1374] Under State aid law, some undertakings could be comparable in absence of competition, and in other cases, some undertakings are comparable since they are in a competitive relationship. When a member state has implemented the arm's length standard in its domestic legal system, the standard requires the comparability based on market-based outcomes. Particularly, the CUP method necessarily requires a comparability between competitors. The other methods do not necessarily require a degree of competition to make economic operators as valid comparable. For example, the resale price method (as indirect method) is generally applied in cases which involve the purchase and resale of tangible property in which the reseller does not add substantial value.[1375] Under the resale price method, under similar circumstances and functions, a washing machines' manufacturer can be a valid comparable of a dryer's manufacturer, in spite of the absence of competition between those markets. Similarly, it can be affirmed for the other methods.

[1370] W. Haslehner, 'Double Taxation Relief, Transfer Pricing Adjustments, and State Aid Law', in I. Richelle et al. (eds), *State Aid Law and Business Taxation*, (Springer, 2016), 156.

[1371] Y. Brauner, 'Formulary apportionment and transfer pricing: the good, the bad and the misguided', in A. Dourado (ed) *Movement of persons and tax mobility in the EU: changing winds*. (IBFD, 2013), 387. W. Schön, 'Transfer pricing – business incentives, international taxation and corporate law', in W. Schön and K. Konrad (eds) *Fundamentals of international transfer pricing in law and economics*. (Springer, 2012), 47–53.

[1372] The OECD recognizes that the arm's length standard partially ignores the benefit of the synergy: See OECD TGP, (n32), para. 1.10.

[1373] DG Competition Working paper, 32, para 109.

[1374] In recent cases, the EC has argued that the reference system should be the ordinary rules for the taxation of corporate profits in the relevant member state. The Commission contends that standalone companies and MNEs are both subject to corporate income tax and that they therefore are comparable, because both pay corporate income tax.

[1375] Para 2.29 in Chapter II of the OECD Guidelines.

The same cannot be argued for the CUP method, which by comparing prices, it requires a degree of competition. The principal difference between the CUP method and the other traditional transaction methods is that the formers compare the prices for a comparable product or service in comparable circumstances, whereas the resale price method (or the cost-plus method) seek to establish the gross margin that an enterprise might be expected to earn in view of its function performed, assets used and risk assumed. Therefore, the "*product differences*" are less likely to have material effect on gross margins as they do on CUPs.[1376] In this regard, some commentors have proposed that the "*substitutability*" od the services or products can be regarded as a relevant element to assess whether undertakings are in a comparable situation in law and in fact.[1377]

In conclusion, the comparability test based on the degree of competition cannot be used as a general approach to test the selectivity. The fact that some TP methods do not require a competitive relationship to test the comparability is a demonstration. However, the use of competitors as a comparable to test the selectivity is an approach that cannot be excluded. When the domestic law requires the comparability based on competition, competitors become the normal market reference. In particular, when the arm's length standard is part of the domestic law, it introduces a legal fiction that necessarily requires the comparability between stand alone and independent companies in order to assess the market outcome. The CUP method is the TP method that major relies on competitive relationship since it is the only method that compares prices. The explicit information that the CUP method is the preferred choice of both OECD's and EC should not be ignored. Although both of them have showed their preference, the EC's peculiarity boils on the major reliance competition, which is the essence of State aid law. Although the principal aim of the arm's length standard is the allocation of taxing rights, the aim to avoid the distortion of relative competitive position between associated and independent enterprises should not be ignored.[1378] Differently from the fundamental freedoms, State aid law covers not only cross-border transactions but also domestic ones. Therefore, the allocation of taxing rights purpose is irrelevant for domestic TP transactions between associated enterprises. On the contrary the arm's length standard aims to avoid the distortion of relative competitive position between associated and independent

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[1376] O.R. Hoor, *Transfer Pricing in Luxembourg*, (Legitech, 2021) 125.

[1377] P. Nicolaides and I. E. Rusu, 'The concept of selectivity: An ever-wider scope', (2012) European State Aid Law Quarterly4, 791-803. Similarly, in the *British Aggregates* case, the General Court held that "*there is at least a potential link in terms of competition or of substitutability between the various aggregates as regards their use or commercial exploitation*". See GC T-210/02, *British Aggregates Association*, para 72. There is, however, another more indirect effect that can be important. Even if there is no substitutability between suppliers, an aid to a downstream firm can affect other suppliers. If the aid leads to a reduction of sales and profits from the recipients' downstream competitors, then these will demand fewer inputs from their suppliers. Hence, even though these suppliers are in completely separate markets, they are still negatively affected. See R. Nitsche and P. Heidhues, 'Study on methods to analyze the impact of state aid on competition', (2006) European Economy, European Commission Economic Papers.

[1378] Para 1.8. OECD TP Guidelines 2017: "*Because the arm's length principle puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity*".

enterprise and this is relevant for domestic TP transactions. In light of State aid law, the arm's length standard should be read keeping in mind its aim to avoid distortion on competition.

Therefore, the CUP method minimizes the risk of State aid disputes, since it requires a direct comparability between competitors, and the competition itself acts as guarantor of the reliability of the arm's length results. When the comparability assessment requires a competitive relationship, the arm's length result provides more reliable result of the market outcomes. In this regard, within the State aid investigations on TP transactions, the selectivity boils down on one single determination, namely, whether the concerned transfer prices were - or not - set at market levels.[1379] Among all methods the CUP method provides more reliable market-based outcomes. Moreover, this economic approach is in line with the "*State Aid Action Plan*" which provided a "*refined economic approach*".[1380] The use of other methods does not mean necessarily that the transaction is selective. In the same vein, the use of the CUP method does not necessarily mean that the transaction is not selective. However, the use of the CUP method reduces the likelihood of being investigated since its comparability is based on competitors, which reflect - with less discretion- the market-based outcome.

In conclusion, according to the EC notice, "*a tax ruling which endorses a transfer pricing methodology for determining a corporate group entity's taxable profit that does not result in a reliable approximation of a market-based outcome in line with the arm's length principle confers a selective advantage upon its recipient. The search for a 'reliable approximation of a market-based outcome' means that any deviation from the best estimate of a market-based outcome must be limited and proportionate to the uncertainty inherent in the transfer pricing method chosen or the statistical tools employed for that approximation exercise.*"[1381] It is true that the choice of one method rather than others does not necessarily means the measure is selective. However, the choice of one method rather than others is more probable that the measure will be investigated under State aid law.

4.4.7.2. Indirect Methods: A Departure From Two-Sided Methods as a Fiscal State Aid Hallmark (Risk of Selectivity)

The EC has indicated that tax rulings based on a two-sided TP method are "*less likely*" to deviate from a market outcome.[1382] In the *Amazon* case, the EC claimed that the correct TP method should have been the profit-split method (a two-sided method) and not the TNMM

[1379] A. Giraud and S. Petit, 'Tax Rulings and State Aid Qualification: Should Reality Matter?', (2017) EStAl2, 233.
[1380] European Commission, 'State aid action plan - Less and better targeted state aid: a roadmap for state aid reform 2005-2009' (Consultation document), COM/2005/0107 final, paras 22 and 23.
[1381] Commission *Notice* on the notion of *State aid* as referred to in Article 107(1) of the Treaty on the Functioning of the *European Union*, EU pub, 2016.
[1382] European Commission, Study on the Application of Economic Valuation Techniques for Determining Transfer Prices of Cross Border Transactions Between Members of Multinational Enterprise Groups in the EU, Directorate-General for Taxation and Customs Union, December 2019.

(a one-sided method).[1383] We argue that one-sided methods are a fiscal *State aid hallmark* because they leave more room for discretion and increase the risk of selectivity.

Discretion is one of the risk indicators that have to side effect from State aid perspective.[1384] In the *Apple* case, if the EC proved that the measures taken by the Irish tax authority were entirely discretionary, there would be ground to switch the burden of proof to Ireland.[1385] The CJEU affirmed that "*If the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which a financial assistance is provided*", that discretion can be considered selective.[1386] The CJEU does not totally ban discretion but only the discretion general in nature.[1387] A degree of discretion would still be acceptable to the extent that it is exercised within the objective limits of the tax system.[1388] As the CJEU has held, it is not necessary to demonstrate that the conduct of the tax authority is arbitrary but only that the discretionary power enjoyed by the tax authority allows it to vary the amount of, or the conditions for granting, a tax concession according to the characteristics of the investment project submitted for evaluations.[1389]

Moreover, the CJEU held that if the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which the financial assistance is provided, on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion must then be regarded as favouring certain undertakings or the production of certain goods.[1390] Even measures of general application, which can be applied to undertakings in general, may be selective insofar as the tax administration called upon to apply them has discretion – "*degree of latitude*" - as regards their application.[1391] Even though it is not certain whether the ordinary domestic rules of taxation of corporate profits should be considered as the reference system, selectivity is about "*discrimination*" or "*derogation*".[1392] The *World Duty Free Group* case confirms that discrimination can be one of the condition for the selectivity and the individuation of a particular undertaking cannot be necessary.[1393] Therefore, more discretion increases the risk of selectivity.

Considering the relevance of discretion, which method leaves more room for discretion? The indirect TP method, and in particularly the TNMM, is the method that entails more risk of selectivity since it leaves more room for discretion. First, the TNMM gives the possibility to

[1383] GC Decision in *Amazon*, paras 34, 300-301, and 317.
[1384] N. Chesaites, 'Tax Incentives as State Aid', in V. Tomljenović et al. (eds.), *EU Competition and State Aid Rules*, Springer-(Verlag 2017), 272.
[1385] Haslehner and Ancora (n. 1284) 233-234.
[1386] C-6/12, *P*, Judgement of 18 July 2013, ECLI:EU:C:2013:325, para 27.
[1387] Case C-256/97 *DM Transport* [1999] ECR I-3913, para 27.
[1388] C-6/12, *P*, Judgement of 18 July 2013, ECLI:EU:C:2013:325, paras 25 and 26.
[1389] Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álav and Gobierno Vasco v. Commission* ECLI:EU:T:2009:315, para 154.
[1390] Case C-6/12 P *P Oy*, ECLI:EU:C:2013:525, paras 26 and 27.
[1391] Case C-241/94 *France v. Commission* ECLI:EU:C:1996:353, paras 23 and 24. See also 1998 EC Notice (n….._, para 22 and Commission 2016 Notice n.32, paras 123-125.
[1392] R. Mason, 'An American View of State Aid, Special Report', (2021) Tax notes 645.
[1393] Case C-51/19 P, *World Duty Free Group v European Commission*, ECLI:EU:C:2021:793, para 99.

choose the tested party, and secondly the choose of the profit level indicator. Even if the factual circumstances may bring the taxpayers to select the TNMM, the possibility of choosing the tested party and the profit level indicator are enabler of treating similar situations differently. In the Fiat case, for example, the EC did not challenge the choice of the TP (i.e. the TNMM) but the choice of the profit level indicator.[1394] In a second line of reasoning, the EC argued that, even if the TNMM can be considered the right choice, it was applied incorrectly due to the wrong identification of the SMBV's functions, and the use of operating expenses as a profit level indicator was also incorrect.

The General Court held that the EC can prove a tax advantage only if the difference between what the EC says should have been included and what the state included "*goes beyond the inaccuracies inherent in the methodology used to obtain that approximation*."[1395] So, given the imprecision of TP methods, the arm's length standard provides a residual discretion on tax authorities.[1396] However, the indirect methods are more likely to be considered selective than other methods. methods. On the contrary, the CUP method leaves less room of discretion because it relies more on the direct comparability of prices which – as previously discussed – are based on the result of competition, which is considered as guarantor of the reliability of the data. Similarly, the Profit Split Method (another two-sided method) leaves less room for discretion since it forces tax authorities (and taxpayers) to take into consideration the same situation from two different perspectives (the two sides). In this regard, the JTPF published a report[1397] on the application of the Profit Split Method within the EU.[1398] The Report is based on the OECD's revised guidelines and specifies the appropriate and correct applications of the PSM. [1399] In *Amazon*, the EC claimed that the correct TP method should have been the profit-split method (a two-sided method) and not the TNMM (a one-sided method).[1400] According to the General Court, if a national administration enjoys room for discretion to grant a favourable tax measure, there is a presumption of selectivity.[1401]

[1394] *Fiat* Final Decision, FFT SA.38375 C (2014) 3627 final (2014). The ruling endorsed the application of the TNMM, as well as the methodology proposed by FFT, according to which capital was used as a profit level indicator. However, instead of choosing the total amount of FFT's accounting equity to serve as the indicator, an amount of capital that was considered necessary for FFT to perform its functions and bear its risks was estimated. See F. Cachia, 'Analysing the European Commission's Final Decisions on Apple, Starbucks, Amazon, and Fiat Finance & Trade', (2017) EC Tax Review, 2017-1.

[1395] GC *Starbucks*, para 152.

[1396] R. Mason, 'Implications of the Rulings in Starbucks And Fiat for the Apple State Aid Case', (2019) Tax Notes Federal, 93.

[1397] European Commission, 'EU Joint Transfer Pricing Forum, The Application of the Profit Split Method within the EU', Taxud/D2DOC: JTPF/002/2019/EN, March 2019.

[1398] The PSM is one of the five transfer pricing methods recommended by the OECD's transfer pricing guidelines to establish whether conditions of an intragroup transaction are at arm's length. See OECD (n.32)133.

[1399] OECD, 'Revised Guidance on the Application of the Transactional Profit Split Method: Inclusive Framework on BEPS: Action 10', OECD/G20 Base Erosion and Profit Shifting Project, (OECD 2018).

[1400] GC Decision in *Amazon*, paras 34, 300-301, and 317.

[1401] See Commission Notice on the application of the State aid rules to measures relating to direct business taxation, Official Journal C 384, 10/12/1998, paras 21 and 22. In that respect, the General Court stated as follows: "*in order to preclude characterisation as a general measure (...) [i]t need only be established, as it has been in this case, that the administration has a discretionary power enabling it, in particular, to vary the amount of, or the conditions for granting, the tax concession in question according to the characteristics of the investment project submitted for its assessment*", in GC, Joined cases T-92/00 and T-103/00*Territorio Histórico de Álava - Diputación Foral de Álava, Ramondín SA v Commission of the European Communities*, , para 35.

It must be pointed out that a *State aid hallmark* concept (as the risk concept) does not entail that TNMM shall be always qualified as State aid, or that it is certain that the CUP method is will never be considered as State aid. However, the TNMM is more likely to be qualified as State aid due to its inherent possibilities of discretion.

4.4.8. Unilateral APAs as a State aid Hallmark: The Reliance on (Tax) Competition

Within the State aid Law framework, there should not be in principle any difference between the unilateral and bilateral APAs to the extent both produce the results of market conditions.[1402] However, unilateral APA should be considered a *State aid hallmark* for the following considerations.

First, the OECD TPG (2022) explicitly expresses a preference since: "*A bilateral APA carries less risk of taxpayers feeling compelled to enter into an APA or to accept a non-arm's-length agreement to avoid expensive and prolonged enquiries and possible penalties. A bilateral APA also reduces the chance of any profit either escaping tax altogether or being doubly taxed*".[1403] Similarly, the OECD's Final Report on Action 14 of 2015 recommended disputes avoidance mechanisms as a best practice that countries should implement through bilateral advance pricing agreement programs.[1404] Moreover, APAs concluded bilaterally between treaty partner countries provide an increased level of certainty in both jurisdictions while reducing the risk that a national tax authority adjusts a TP transaction to provide a more favorable outcome in their jurisdiction.[1405]Scholars agree with the OECD and suggest that bilateral APA should be the preferred solution to prevent TP disputes on an upfront basis.[1406]

If bilateral APAs have been considered by the OECD as a valid dispute avoidance mechanism, (better than unilateral ones) how can they be considered also reliable from the risk of the State aid disputes? The answer lies in the concept of tax competition.

If competition is considered as guarantor of arm's length results for transactions between independent companies,[1407] we argue that tax competition is a guarantor of the agreement concluded between tax authorities under a bilateral APAs. Although scholars have discussed

[1402] S. Vera, 'The Transfer Prices, a way of influencing the performance of a company', Atlantis Press, (2015) *Univers Strategic*. P. Valente, Piergiorgio, 'Advance Pricing Arrangements: Optimal Tool–Optimal Framework?'(2020) *Intertax* 48(1)pp. 45-46.
[1403] OECD *Transfer Pricing Guidelines*, (2022) para 4.173.
[1404] OECD, Action 14 Final Report (2015), *supra* n. 7, at Best Practice 4, para. 48.
[1405] Ibid
[1406] M. Markham, 'Are Advance Pricing Agreements Experiencing a Renaissance as a Dispute Resolution Mechanism in the Era Following the OECD/G20's Base Erosion and Profit Shifting Initiative?' (2020) Bulletin for International Taxation, 13; K. Chung, A. Castoldi and L. Tanner, 'APAs: A leading practice to resolve and avoid TP disputes', (2019) Intl. Tax Rev, pp.45-57.
[1407] J. P. Choi, T. Furusawa, and J. Ishikawa, Transfer pricing and the arm's length principle under imperfect competition, CESIFO Working paper series 7303, 2018, pp.12-13.

about a possible interconnection between tax competition and State aid, the analysis from the State aid risk standpoint is missing.[1408] The previous literature did not cover the role of the tax competition, particularly on how the relevant interests of the contracting member states may clash during a bilateral or multilateral APA while providing a State aid risk mitigator.

Tax competition is deeply analysed in economics literature.[1409] Wilson and Wildasin in 2004 defined tax competition in a broad sense as "*any form of non-cooperative tax setting by independent governments*".[1410] This general definition embraces other forms of competition where taxes play a role of yardstick between independent governments. According to this definition, non-cooperatively means that a government does not take into account the impact of its decisions upon other governments.[1411]

The first interconnection between tax competition and State aid law, and the relevance of former for the EC dates back from the adoption of the Code of Conduct for business taxation on 1 December 1997.[1412] The Code is the result of a discussion about unfair tax competition among OECD and EC member states in the late 1990s showing that member states' tax individualism ultimately leads to a tax race to the bottom in attracting foreign investments.[1413] The Code of Conduct has however also pointed out that some elements of unfair tax competition could already be targeted by the legally binding EC State aid rules. Tax policy, the implementation of tax laws and tax administration need to ensure there is a level-playing field in the Single Market.[1414]

Among the differences mentioned, perhaps the most relevant is that State aid aims to eradicate the distortion in "*competition between companies*" due to states, through their tax policies, favoring certain economic operators over others in a comparable legal and factual situation. The EU Code of Conduct aims to eradicate distortions of "*competition between member states*", as harmful

[1408] P. Pistone, 'Smart Tax Competition and the Geographical Boundaries of Taxing Jurisdictions: Countering Selective Advantages Amidst Disparities', (2012) Intertax, Volume 40, Issue 2,98-99. M. Monti, 'How State Aid Affects Tax competition', (1994) EC Tax Review, 1999-4, 67-69; T. Jaeger, 'Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?', (2017) Journal of European Competition Law & Practice, Vol.8, no.4, 87-89; A. Fantozzi, 'The applicability of State aid rules to tax competition measures: A process of "De Facto" harmonization in the tax field?', In W. Schon (ed.), *Tax Competition in Europe*, (Springer, 2003).

[1409] G. Pulina and S. Zanaj, 'Tax competition and phantom FDI', (2022) Journal of Public Economic Theory, 1-22.

[1410] J.D. Wilson, and D. E. Wildasin 'Capital Tax Competition: Bane or Boon?' (2004) Journal of Public Economics, 88, 1066.

[1411] See also the comments by C. Bellak and M. Leibrecht, 'Corporate Income Tax Competition and the Scope for National Tax Policy in the Enlarged Europe', in K. Andersson, E. Eberhartinger and L. Oxelheim (eds), *National Tax Policy, To Be or Not to Be?* (Springer 2007), 12.

[1412] Resolution of the Council and the Representatives of the Governments of the Member States, Council meeting of 1 December 1997 on a code of conduct for business taxation, OJ 1998 C 2, p 2.

[1413] F. P. Sutter, The Influence of the European State Aid Rules on National Tax Policy, in K. Andersson, E. Eberhartinger and L. Oxelheim, *National Tax Policy, To Be or Not to Be?* (, Springer 2007),12.

[1414] CFE Europe, 'Opinon Statement FC 10/2018 on the European Commission Platform for Tax Good Governance Discussion Questionnaire on Tax Competition and Competitiveness', December 2018, pp. 76-77.

regimes can erode the tax base of other member states.[1415] In the case of bilateral APAs, the previous difference conflates because of the bilateral nature of APAs that incentivized member states "*in competition between them*" to assess the same TP transaction by favoring unduly ax advantage in disfavor of the other. This double analysis of the same transaction conducted by different tax authorities and the tax competition between member states does not mean that it is certain that there is no State aid. However, it means that a situation of State aid is unlikely (due to the double check and due to the divergent interests). For example, there can be a situation of agreed double base erosions without profit shifting, or there can be an agreement between two member states about favoring certain enterprises.

This reliance on tax competition between member states is the same reliance on which stands the arm's length standard when it relies on competition between companies. The EC has indicated that tax rulings based on a two-sided approach are "*less likely*" to deviate from a market outcome,[1416] and the underlying reason is because tax competition favours situations of arm's length transactions between member states. On the contrary, individual tax rulings do not have be agreed between different member states, and, as previously argued, they can be qualified as a *State aid hallmark*.

4.4.9. The Severity Component of State Aid Risks

In the State Aid Action Plan to pursue "*Less and better targeted State aid*", the EC concluded that the most efficient use of resources would be to pursue the largest cases that would have the highest value.[1417] In line with the aforementioned Action Plan, the value (or the severity component of risk) should be taken into consideration. Another requirement of State Aid Action Plan is to consider the scarcity of the available resources. Therefore, the calculus of the severity should be construed straightforwardly. A viable and straightforward solution that can be used is the same as that used in DAC 4. [1418] In accordance with the DAC4, not all MNEs are required to submit the information for the scope of the exchange mechanism. The so-called "*Excluded MNE Groups*" are the MNEs that operate as a Group having total consolidated group revenue of less than EUR 750.000.000 as reflected in its Consolidated Financial Statements for the preceding fiscal year, which do not have the obligation to submit the information for the exchange. Considering thar the severity component fulfils what has

[1415] P. Lampreave, 'Harmful Tax Competition and Fiscal State Aid: Two Sides of the Same Coin?', (2019) European Taxation, 208. See also R. H. C. Luja, 'Harmful Tax Policy: When Political Objectives Interfere with State Aid Rules', (2003) Intertax, Vol. 31, Issue 12, 484.
[1416] European Commission, 'Study on the Application of Economic Valuation Techniques for Determining Transfer Prices of Cross Border Transactions Between Members of Multinational Enterprise Groups in the EU. Directorate-General for Taxation and Customs Union'. December 2019., pp.89-90.
[1417] S.U.J. Niazi and R. Krever, 'Bespoke tax rulings and profit shifting in the European Union: assessing the EU's options, Business Law &Taxation', (2021) Australian Tax Forum, Vol.36, n.3,456-458.
[1418] See Annex II, Sec I, Para 4, DAC 4.

been suggested in the State Aid Action Plan, i.e. to pursue "*Less and better targeted State aid*": it balances the efficient use of resources (the total consolidated group revenue is data available to tax authorities), and targets only those large cases that would have the highest value, and therefore those that most affect the competition in the internal market.

4.4.10. The Dispute Avoidance Measure

The dispute avoidance mechanism can take the form of a mandatory automatic exchange of information mechanism. The form can be a Directive similar to the DAC 6. However, in this particular legal framework member states should cooperate with the EC rather than with each other only. The competent authority of each member state shall communicate to the EC the information available at the time of their assessment. The EC is required to reply within 2 months with a preliminary assessment of the case. Then, the current State aid rules of procedure can be applied (i.e. preliminary investigation, investigations etc.).

4.4.11. Partial conclusion

In this sub-Chapter, we have discussed about how the "*the risk of State aid investigations*" can be analyzed, while providing a dispute avoidance mechanism based on a list of State aid risk indicators that we have called *fiscal State aid hallmarks*. Dispute avoidance mechanisms – such as exchange of information mechanisms (CbCR, DAC)– list pre-identified risky indicators that will be subject to the exchange since they are most likely to be disputed.

As discussed in the first sub-Chapter, risks are forms of uncertainty that matters.[1419] Hence, the risk of State aid disputes can be mitigated only if the relevant State aid law uncertainty will be considered. On the contrary, using dispute avoidance mechanisms, such as APAs, which are valid legal instruments for avoiding tax disputes, does not actually address the risk of State aid. Fiscal *State aid hallmark*s address specifically such law uncertainty that – for the scope of this thesis – cover fiscal State aid investigations, particularly within the tax ruling framework. Within this legal framework, State aid risk indicators are characteristics or features identified as potentially indicative of State aid entailing a notification, if met.

Objectives are a fundamental step for the proper risk assessment since different objectives affect the risk assessment. The link between objectives and risk is reported by the EC in its guide "*Risk Management Guide for Tax Administrations*". Under the State Aid risk assessment, since the EC has different objectives compared to tax authorities, the arm's length standard should be assessed in light of the EC's objectives in the area of competition law. The

[1419] Cf: 4.3.2.

competition function of the arm's length standard is consistent with the EC' assurances that if the OECD Guidelines are followed, the result is *"unlikely"* to give rise to State aid.

Contrary to other tax risk assessments, from the State aid risk standpoint, individual tax rulings can be considered as a fiscal *State aid hallmark*. Although the EU JTPG suggests APAs as a method of dispute avoidance mechanism, individual tax rulings not only are not neutral from the risk of State Aid investigations, but they increase the risk of disputes. The increased of risk of State aid is based on the increased risk of selectivity. Tax rulings are by their nature an occasion to apply discretionary power by the tax authorities. Assuming that all treatments have the same possibility of being qualified as State aid, more possibility of different treatments increase the likelihood of selectivity. In this regard, the discretion increases the possibility of treating comparable situations differently.

Moreover, an individual tax ruling can be the legal basis for shifting the burden of proof of selectivity from the EC to the member states.[1420] Therefore, when the EC selects the TP cases for pre-investigation, it is incentivized to select those cases that present more chances of winning the case (i.e., with less burden on its side).

A bespoke reference system is another fiscal *State aid hallmark*, since it is the reference system that can most likely make our tax position selective. Thus, if the tax administration supports that the individual tax ruling (or individual tax position) should be considered as a reference system on its own right, then it is much more likely that the tax ruling is selective. Conversely, if the selected reference system is the domestic general tax law, this tax position is less likely to be regarded as selective.

Some TP methods present more State aid risks than others. The EC states that when TP transactions are compliant with the OECD arm's length principle that transaction is "*unlikely*" to be qualified as State aid. One among all, the TP CUP method is one of the less risky. Differently from the other TP methods that compare costs and profits, the CUP method is the only method that compares prices directly. The CUP method mitigates the risk of State aid disputes, since it requires a direct comparability between competitors, and the competition itself acts as guarantor of the reliability of the arm's length results.

The EC has indicated that tax rulings based on a two-sided TP method are "*less likely*" to deviate from a market outcome. We have argued that fiscal *State aid hallmark*s are one-sided methods, because they leave more room for discretion and increase the risk of selectivity. The indirect TP method and, in particularly the TNMM, is the method that entails more risk of selectivity since it leaves more room for discretion, because it leaves the possibility to choose the tested party, and the profit level indicator.

[1420] See Case C-438/16 P *Commission v France and IFP Énergies Nouvelles*, EU:C:2018:737, para. 111; C-559/12*, France* v *Commission*, EU:C:2014:217, paras 98 and 99.

Differently from the bilateral APAs, the individual APAs can be considered as a fiscal *State aid hallmark*, because they do not require an agreement between two member states in tax competition between them. If competition is considered as a guarantor of arm's length results for transactions between independent companies, tax competition is a guarantor of the agreement concluded between tax authorities under a bilateral APAs. On the contrary, individual tax rulings do not have to be agreed between different member states, thus they can be qualified as a *State aid hallmark*.

The listed fiscal *State aid hallmark*s take into consideration only the risk of State aid disputes. Dispute avoidance mechanisms should identify the uncertainty that matters, and should not overlook the objective of the investigators, while selecting the riskiest indicators for limiting the amount of information provided to the EC.

4.5. Chapter Conclusion

Within the EU law framework, improving legal certainty has been considered an EU political priority, especially for tax positions that are generally considered as uncertain, such as TP transactions.[1421] Dispute avoidance mechanisms are considered the most effective way to pursue legal certainty on an *ex-ante* basis with the aim of preventing costly disputes upfront. However, the current EU State aid legal framework is characterised by a lack of dispute avoidance mechanisms. Although dispute avoidance mechanisms do not (and cannot) provide full certainty, they can reduce the likelihood of a dispute, which can be considered as an improvement. A diligent taxpayer, who doubts about the compliance of their tax position, has no formal access to the EC to obtain a decision. When legislators and enforcement authorities are dealing with *ex-ante* situations – such as to find future or situations that are more likely to trigger disputes - they are forced to deal with uncertainty and the related likelihood that certain law effects arise. In this regard, all dispute avoidance mechanisms are based on selected measures that are likely to be disputed.

Since one of the aims of this thesis is to propose a legal instrument to reduce (or avoid) the risk of State aid disputes for taxpayers involved in TP transactions in EU, it is crucial to understand what does risk and uncertainty mean, how (legal) risk and the risk of disputes is correlated to (legal) uncertainty, and how risk and uncertainty are meant within the legal framework, especially within the fiscal State aid law framework and the disputed TP rulings.

Although it appears intuitive what does reducing the risk of dispute mean, risk is not a well-known concept in the EU law, and in the legal science generally. (Legal) uncertainty is the commonly used concept indicative of the uncertainty of law effects that may cause disputes

[1421] European Commission's Directorate-General for Taxation and Customs Union, 'Tax Uncertainty: Economic Evidence and Policy Responses', (2017) Taxation Paper n. 67/2017.

between tax authorities and taxpayers, or between the EC and member states in case of State aid investigations. However, risk and uncertainty are two distinct concepts. Not all forms of uncertainty are risks but only the uncertainty that matters.[1422] In economics, engineering, and management sciences, risk is considered as the result of impact (severity) and probability. In the EU legal framework, although legal risk is barely used and defined, its inherent concept can be extrapolated from judgments and law.

When the CJEU has been asked for *ex-post* protection based on the legal certainty principle, it has evaluated the level of law uncertainty and its effects disregarding the impact (severity). The CJEU interpretation is perfectly in line with State aid law. It is irrelevant if the amount of unpaid tax is several billions, as in the *Apple* case or just a few euros. Whenever the economic benefit is provided, the financial situation of the undertaking is improved because of the State aid. The impact of a state intervention is not relevant from a pure correctness standpoint. In granting protection based on the principle of legal certainty, the CJEU considers the level of uncertainty, i.e., the measure the uncertainty of a particular case and the ability of taxpayers to foresee the legal effect (the probability of the outcome). The CJEU evaluates uncertain legal positions by taking as reference EU law and its judgments in previous similar cases. In probabilistic terms, when conspicuous case law is available, the foreseeably of the effect of law can be expressed through a frequentist interpretation of probability. When the case at stake is the first evaluated case (the so-called test case), subjective probability is the suitable interpretation of probability. The ability of taxpayers to use subjective provability rather than frequentist probability is an indication of the level of foreseeability of the effect of laws since the frequentist approach provides more certainty. Instead of expressing two extreme concepts as certain and uncertain, a legal risk analysis expresses more precisely the nuances ranging from certainty to uncertainty.

Unlike the CJEU judgments, dispute avoidance mechanisms, such as DAC 6, (CbC) and other forms of exchange of information mechanisms, consider both (legal) risk components: (i) the possible impact at stake (companies with a conspicuous turnover), and some indicators that present a likelihood that can be disputed. Even in this case, although the legal risk concept is not precisely defined by the EU legislator, it can be deduced through several dispute avoidance mechanisms. The legal risk – with both its components – is used by the EU lawmakers as a tool of selection to limit the amount of information and select only legal risky transactions that can be disputed. The individuation of the proper legal risk is paramount to manage the aimed uncertainty. In the various EU Directives on tax cooperation, in the JTPF Report on TP Risk Management as well as in the EC Compliance, Risk Management Guide fiscal State aid risks are never mentioned or cited as an independent risk factor. The EC Communication on the work of the EU JTPF on TP documentation for associated enterprises in EU clarifies that for tax administrations risk assessment is regarded as the most important case selection tool and as a tool for specific inquiries and tax audits. On the other hand, risk assessment may help

[1422] On the contrary, all risks are considered as uncertainty: Cf:4.3.2.

taxpayers to concentrate pro-actively on "risk" transactions, which may require more detailed explanations and documentation and can also help to improve the applied TP system.[1423]

In the current fiscal State aid law framework, a dispute avoidance mechanism that takes into consideration State aid risks is missing. The proposed fiscal State aid risk indicators (that we call fiscal *State aid hallmark*s) are a case selection tool for the notification or for the EC for its future investigations on uncertain TP transactions. In this sub-Chapter we have discussed about how the "*the risk of State aid investigations*" can be analyzed while providing dispute avoidance mechanisms based on a list of State aid risk indicators (we call them fiscal *State aid hallmark*s) for TP rulings.

First, it is essential to recognize State aid investigations as uncertainty that matters. A shortcoming of this consideration jeopardizes the entire risk assessment for fiscal State aid risks. Contrary to the OECD that has recognized BEPS actions that may cause tax uncertainty and increase the risk of disputes, the EU bodies lack of self-recognition of State aid may cause tax uncertainty. Once fiscal State aid law has been recognized as an independent source of uncertainty, specific risk indicators should be identified and listed as a basis for the notification mechanisms. Fiscal *State aid hallmark*s are the risk indicators that can be defined as characteristic or feature identified as potentially indicative of State aid entailing a notification if met. The hallmarks concept has been taken from the DAC 6. This thesis is limited to fiscal *State aid hallmark*s of TP rulings.

Objectives are a fundamental step for the proper risk assessment. The objective of the risk assessor determines the outcomes of the risk analysis since objectives affect the selection of those uncertainties that matter. The link between objectives is reported by the EC in its guide on "*Risk Management Guide for Tax Administrations*". Risks will be quite different depending on the objectives. In this regard, it is relevant to consider that the EC can investigate deemed tax advantages already approved by tax authorities. However, the EC has different objectives compared to tax authorities. The main difference is that tax authorities do not have any responsibility for the correlated effect on competition. Therefore, it is pivotal to analyze the arm's length standard in light of the EC's objectives in relation to competition. The competition function of the arm's length standard is consistent with the EC' assurances that if the OECD Guidelines are followed, the result is *"unlikely"* to give rise to State aid. The different objective between EC and tax authorities is one of the reasons behind the different treatment of the same TP transaction under a tax audit as compared to a State aid investigation.

Contrary to other tax risk assessments, from the State aid risk standpoint, individual tax rulings can be considered as *State aid hallmark*s. Although the EU JTPG affirmed that "*APAs are an exemplary method of dispute avoidance*", and "*a unilateral APA might still be preferable to a taxpayer than*

[1423] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum on Transfer Pricing Documentation For Associated Enterprises in the EU, COM (2005) 543 final, para 3.2.

no APA of any kind", we have argued that individual tax rulings not only are not neutral from the risk of investigations, but they also increase the risk of disputes. This means that a TP transaction not agreed on tax rulings is less likely to be investigated than the same transaction covered by a tax ruling. The increased risk of State aid is based on the increased risk of selectivity. Tax rulings are by their nature an occasion to apply discretionary power by the tax authorities. Particularly, individual tax rulings can be selective when the exercise of that discretionary power extends beyond the simple management of tax revenue in accordance with objective criteria.[1424] According to the CJEU, a delegation system that allows the competent authority to freely choose the beneficiaries or to establish conditions inherent to the objectives of the tax system to be met can be selective (since it is not considered as general). According to the CJEU, discretion that enables authorities to determine the beneficiaries of or the conditions under which a fiscal advantage is provided, implies that the measure is selective. Assuming that all treatments have the same possibility of being qualified as State aids, more possibility of different treatments increase the likelihood of selectivity. In this regard, the discretion increases the possibility of threating comparable situations differently. Moreover, an individual tax ruling can shift the burden of proof of selectivity from the EC to the member states.[1425] The so-called presumption of selectivity (due to the inherent individual nature of individual tax rulings) shifts the burden of proof onto the parties and allows the EC to demonstrate the selectivity analysis once it has demonstrated that an advantage has been granted. Therefore, when the EC selects the TP cases for pre-investigation, it is incentivized to select those cases that present more chances of winning, and, since the selectivity is one of the most difficult burdens on the EC side, a waiver in this regard plays a role on State aid risk analysis. Therefore, individual tax rulings can be considered as fiscal *State aid hallmark*s.

A bespoke reference system is another fiscal *State aid hallmark*, since it is the reference system that can most likely make our tax position selective. Thus, if the tax administration supports that the individual tax ruling (or individual tax position) should be considered as a reference system on its own right, then it is much more likely that the tax ruling is selective. Conversely, if the selected reference system is the general tax law, this tax position is less likely to be regarded as selective.

Although the selection of the TP method is based on the facts and circumstances, some TP methods are riskier than others from a State aid risk perspective. The EC clearly formulates that, when TP transactions are compliant with the OECD arm's length principle, that transaction is "*unlikely*" to be qualified as State aid. In the *Amazon* case, the GC stated that "*In those circumstances, it must be held that the Commission has not demonstrated the existence of an advantage, but has, at most, demonstrated the probability of the existence of an advantage*".[1426] From a dispute

[1424] Case C-241/94, *France v Commission*, paras. 23 and 24.
[1425] Case C-438/16 P *Commission v France and IFP Énergies Nouvelles*, EU :C:2018:737, para. 111 ; C-559/12*, France* v *Commission*, EU:C:2014:217, paras 98 and 99.
[1426] GC *Amazon*, para 520.

avoidance perspective, the "*probability of the existence*" of State aid is relevant for the selection of the case for the notification.

For example, the TP CUP method is one of the less risky methods. Differently from the other TP methods that compare costs and profits, the CUP method is the only method that compares price directly. The EC has agreed with the OECD TP Guidelines by pointing out that the use of a particular TP method provides a more reliable method to approximate a market-based outcome than others do.[1427] State aid direct comparability based on price requires that comparable shall be competitors. The comparability based on the degree of competition could not be used as a general rule to establish the identification of the correct comparable undertakings, but it should be used only when is required by the reference system, that is the rules applicable to the case. Particularly, the CUP method necessarily requires a comparability between competitors. The other methods do not necessarily require a degree of competition to make economic operators as valid comparable. Therefore, the CUP method minimizes the risk of State aid disputes, since it requires a direct comparability between competitors, and the competition itself acts as guarantor of the reliability of the arm's length results.

The EC has indicated that tax rulings based on a two-sided TP method are "*less likely*" to deviate from a market outcome. We have argued that one-sided methods are a fiscal *State aid hallmark*, because they leave more room for discretion and increase the risk of selectivity. The indirect TP method and, in particularly the TNMM, is the method that entails more risk of selectivity since it leaves more room for discretion. First, the TNMM gives the possibility to choose the tested party, and secondly to choose the profit level indicator. Even if the factual circumstances may bring the taxpayers to select the TNMM, the possibility of choosing the tested party and the profit level indicator are enablers of treating similar situations differently.

Differently from the bilateral APAs, the individual ones can be considered as fiscal *State aid hallmark*s, because they do not require an agreement between two member states in tax competition between them. If competition is considered as a guarantor of arm's length results for transactions between independent companies, tax competition is a guarantor of the agreement concluded between tax authorities under a bilateral APAs. This reliance on tax competition between member states is the same reliance on which stands the arm's length standard when it relies on competition between companies. The EC has indicated that tax rulings based on a two-sided approach are "*less likely*" to deviate from a market outcome, [1428] and the underlying reason is because tax competition favors situations of arm's length transactions between member states. On the contrary, individual tax rulings do not have to be

[1427] DG Competition Working Paper, n.32, para 19.

[1428] European Commission, 'Study on the Application of Economic Valuation Techniques for Determining Transfer Prices of Cross Border Transactions Between Members of Multinational Enterprise Groups in the EU'. Directorate-General for Taxation and Customs Union. December 2019.

agreed between different member states, and, as previous argued, they can be qualified as a *State aid hallmark*.

Finally, the decision to apply for an APA (rather than not to apply for), the decision to take the riskier TP method, and the other decision to take the listed State aid riskiest factors should not been seen in isolation. All those decisions taken together in the same APA increase the risk of disputes compared to each individual decision.[1429]

In conclusion, we have proposed a dispute avoidance mechanism based on fiscal *State aid hallmark*s, which identify the uncertainty that matters for State aid investigations, they do not overlook the objective of the investigator, and limit the amount of information that should be provided to the EC. The proposed dispute avoidance mechanism is in line with the State Aid Action Plan for "*Less and better targeted State Aid*".[1430]

[1429] For the fundamentals of axiom of probabilities, see A. Kolmogorov *Foundations of the theory of probability*, Chelsea Publishing Company, 1950.

[1430] State Aid Action Plan: "*Less and better targeted State aid*": a roadmap for State aid reform 2005-2009, Appendix 7, Code of Best Practice for the conduct of State aid control procedures, 2005, pp.56-78.

5.Final Conclusions and Findings

The concluding Chapter summarises and develops the three main findings of the thesis.

5.1. A Less Stringent Application of the Doctrine of Legal Certainty Principle Within State Aid Law to Allow Taxpayers' Protection When the Effects of Laws Are Unforeseeable.

As discussed in the first Chapter, the legal certainty principle is one of the general principles of EU law aimed at ensuring that "*law should be certain, so that it can be easily enforced and so that people can know where they stand*".[1431] Within the State aid law framework, including fiscal State aids, the legal certainty principle plays a fundamental role in the EC's decisions to order the recovery of incompatible aids. The Council Regulation expressly provides an exception in the recovery of State aid in case of incompatibility with a general principle of EU Law, such as the legal certainty principle.[1432] The protection from recovery was recognized by the CJEU even before the State aid Procedural Regulation entered into force.[1433]More specifically, the legal certainty principle protects taxpayers from the EC's recovery orders, when the State aid law's legal effects have been considered unforeseeable.[1434] In case of a recovery order for fiscal State aids, taxpayers can plead the legal certainty protection to EU judges that are required to evaluate (*ex-post*) whether the level of uncertainty goes beyond the acceptable level to the extent that taxpayers cannot foresee the legal consequences of their actions.

The legal certainty protection has been invoked by Apple, Amazon and the majority of the other taxpayers whose tax ruling have been investigated by the EC. Both the GC and the EC have denied the legal certainty protection by applying a stringent interpretation. This difficulty in accepting the arguments based on legal certainty has been highlighted by several scholars: the legal certainty protection has a "*narrow meaning*", "*the recipient will rarely be successful*", "*high standard the EU courts use for excusing enterprise from recovery, [...] arguments [based on general EU principle's protection] are unlikely to succeed*", "*Court of Justice interpreted them strictly*", "*neither the principle of the protection of legitimate expectations nor that of legal certainty can be relied upon*", the recovery obligation is *"[…] at all cost. Hence, the superiority over the principle of res judicata*", "*member states enjoy virtually no protection by the principles of non-retroactivity*"; or in more iconic terms, "*applicants seeking the benefit of the protection of legitimate expectations should, if not renounce altogether, at least abandon almost*

[1431] Grote (n. 189)271. Lord Mance (n. 189); See also Fenwick and Wrbka (n. 151).
[1432] Case C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, ECLI:EU:C:1997:163, para 25 and Case C-5/89, *Bug-Alutechnik*, ECLI:EU:C:1990:320, paras 13 and 14.
[1433] Case C-1/73, *Westzucker*, [1973] ECR723 (729), para 5; Case C-223/85, *RSV*[1987] ECR 4617 (4659), para 17.
[1434] Cleynenbreugel (n. 783). According to the Art. 16 (1) of Regulation 2015/1589 "*the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union Law*".

all hopes of succeeding in such an endeavor".[1435] This quasi-impossibility - if not impossibility - of obtaining legal certainty protection is a common trend.[1436]

However, this thesis has discussed that in recent fiscal State aid investigations on tax rulings and the related case law, the strict interpretation and quasi-impossibility of obtaining protection from the legal certainty principle have their roots on two main points: (i) the foreseeability analysis - which is the basis to assess the legal certainty protection - has been substituted with the State aid compatibility test - which is the basis for evaluating whether deemed State aid is compatible with the internal market; and (ii) the legal certainty principle has been reduced to the legitimate expectations principle.

(i) The foreseeability analysis - which is the basis to assess the legal certainty protection - has been substituted with the State aid compatibility test - which is the basis for evaluating whether deemed State aid is compatible with the internal market.

In case of incompatibility with the legal certainty principle, two possible situations may occur (i) the exceptions from the obligation to recover the aid under the EC decision, and (ii) the recovery order *ex-post* the decision that may violate the general principle.[1437] The first situation concerns the EC's self-examination when issuing its final decision.[1438] This eventuality is not purely theoretical, as there are cases when the EC has considered that exceptional circumstances can justify the non-recovery.[1439] The second situation concerns an *ex-post* assessment made by the Court as to whether the EC has correctly valued the "*exceptional circumstances*" that deserve the protection of the general principles of EU law.[1440]
The current State aid cases on TP transactions fall under the second situation, and all applicants (except Starbucks) have pleaded to seek the protection of the legal certainty principle. Article 16 Regulation (EU) 2015/1589 of 13 July 2015 on laying down detailed rules for the application of Article 108 of the TFEU states that "*where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the member state concerned shall take all necessary measures to recover the aid from the beneficiary ("the recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union Law*". As laid down in the EU Regulation 2015/1589, the general principle of Union Law comes into play after the EC has taken its "*negative decision*" and the aid has been qualified as "*unlawful*".

The obligation to recover unlawful and incompatible State aids as the logical consequence of the finding that it is unlawful is laid down in the EC State aid notice,[1441] which in turn is based

[1435] Cf: 3.4.2.
[1436] Gometz (n. 73)33.
[1437] See M. Rzotkiewicz, 'Compatibility of the State Aid Recovery Order with the General Principles of EU Law', (2016) 5 Polish Rev. Int'l & Eur. L. 73.
[1438] The EC reached the non-recovery conclusion on its own: see K. Jaros and N. Ritter (n. 411); A. Sinnaeve, 'Procedure Regarding Unlawful Aid' in M. Heidenhain (ed.), *European State Aid Law*, (C.H. Beck, 2010), 642.
[1439] EC Decision, *France Télécom*, C (2004)3060, paras 260-261 ; EC Decision Italy, C (2012)9461, para. 200. EC Decision, *G.I.E fiscaux*, C (2006) 6629, para. 194.
[1440] Case C-39/94, *Syndicat Français de l'Express International*, ECLI:EU:C:1996:285, para. 4.
[1441] European Commission Notice on the recovery of unlawful and incompatible State aid, 2019/C247/5, para 26.

CJEU jurisprudence.[1442] However, the CJEU jurisprudence states that the recovery is the logical consequences of the State aid finding, and it clarifies that the recovery is not a penalty and it cannot depend on the form in which the aid was granted.[1443] The scope of the clarification of the CJEU is limited to the form of State aid and it is not intended to deny the waiver application of the legal certainty protection. Otherwise, any aid that meets the qualifying criteria for being considered incompatible with the internal market would have to be recovered as a logical consequence. The protection of the legal certainty principle is conceived exactly in situations where the state aid qualifying criteria are met, a negative decision is taken and the aid is unlawful.[1444] The final outcome would be that the finding of an unlawful aid would trigger an automatic recovery, regardless of whether any principles of EU law have been violated.

The legal certainty principle is a general principle of EU Law that should apply in all areas of EU law, State aid law included. Therefore, arguments for claiming (taxpayers and member states) or for refusing (EC, GC) the legal certainty protection should be based on the foreseeability test rather than State aid compatibility test. It seems that both EC and GC circumvent the foreseeability test, which is one of the tests used by the CJEU to grant the protection of the legal certainty principle.

At the time of writing this thesis, most of the tax ruling cases are pending before the CJEU and the *FIAT* case has not clarified whether the legal certainty principle can be granted. It must be pointed out that the CJEU cannot substitute its own assessment of State aid with the EC's assessment, but has to review the legality of the exercise of the EC power, the possible manifest error, or whether the EC has exceeded its discretion.[1445] Due to the fact that the review of the compliance with the legal certainty principle is separate from the assessment of the compatibility of a deemed State aid, the CJEU has full power to evaluate the possible legal certainty protection.

In the FIAT case, the CJEU has finally re-stablished legal certainty by clarifying that member states should not assess the state aid compatibility of TP transactions in accordance with an external reference system. The FIAT judgment finally has made certain the inapplicability of non-domestic reference systems. Moreover, the new external reference system, as proposed

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[1442] Joined Case C-164/15 P and C-165/15 P, *Commission v Aer Lingus*, ECLI:EU:C:2016:990, paras114 and 116.

[1443] See the previous case and C-367/14, Commission v Italy ('Venice and Chioggia II'), ECLI:EU:C:2015:611, para 41.

[1444] The CJEU has clarified that the Commission cannot request recovery of unlawful aid without first examining the compatibility of the aid with the internal market under the procedure provided for by Article 108(2) TFEU. To that effect, see Judgment of the Court of Justice of 14 February 1990, *France v Commission* ('Boussac'), C-301/87, ECLI:EU:C:1990:67, paragraphs 9, 10-22.

[1445] Case C-110/03 *Belgium v Commission* [2005] ECR I-02801, para 68; Case C-288/96 *Germany v Commission*, para 26 and Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, para 64. When the EC reaches a final Decision, said Decision must comply with the obligation to state reasons under the second paragraph of Article 296 TFEU, by disclosing in a clear and unequivocal fashion the reasoning it followed. Therefore, judicial review is limited to establishing that the procedural rules have been followed, to verifying the accuracy of the facts, and on examining errors of law and manifest errors of assessment in relation to the facts and misuse of powers. In relation to the economic analysis, it is settled case law that the CJEU cannot replace the Commission's assessment, and is only confined to assessing whether the EC has committed a manifest error: Case C-367/95 P *Commission v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL*, EU:C:1998:154, para. 63; Case C-56/93 *Belgium v Commission*, EU:C:1996:64 para. 86; Case C-301/96 *Germany v Commission*, EU:C:2003:509 para. 65. It is worth noting that the obligation to state reasons is separate from the merits of those reasons. See Case C-159/01 *Netherlands v Commission*, EU:C:2004:246, para. 65.

by the EC, was a new information that could not be processed by taxpayers to foresee the effect of the law. The EC's compliance with the process of investigating the compatibility of deemed State aid is not sufficient to make the EC's new interpretation foreseeable because also the effect of law matters and not only the compliance with the investigation process (i.e., find the reference system, evaluate the deviation, and test the lack of justification). My proposed interpretation is in line with the CJEU jurisprudence on the legal certainty principle and how the Court assesses the effects on legal uncertainty.

(ii) The legal certainty principle is reduced to the legitimate expectations principle.

As argued in this thesis, when the EC denied Apple, Amazon and other investigated taxpayers of the legal certainty protection, it restricted the grounds upon which that principle may be invoked on (i) a manifest failure to act, (ii) breach of the duty of diligence in the exercise of its supervisory powers.[1446] However, in doing so, the EC effectively reduced the legal certainty principle to the legitimate expectations principle, depriving it also of the foreseeability analysis.[1447] For example, in the *Apple* case, Ireland invoked the legal certainty protection and the EC replied on legitimate expectations grounds.[1448] As in the CJEU judgment in *Commission vs Spain and others*, the CJEU may set aside the GC judgment since it has erred in law by not ruling on all the pleas in law raised before it.[1449] According to the EC's interpretation, the principle of legal certainty is limited to cases where the limitation period is at stake.[1450]

The EC's choice to reply on legitimate expectations grounds may be deliberate, as the lack of protection based on legitimate expectations grounds can be easily argued. First, according to CJEU jurisprudence, a member state cannot rely on the protection of the legitimate expectations to justify its failure to comply with its duty to notify.[1451] The member state impossibility to rely on the legitimate expectations principle is well known by the EC.[1452] Lastly

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[1446] Cf: 3.4.3.

[1447] The EC arguments are based on the Case C-408/04 *Commission v Salzgitter*, EU:C:2008:236, paras 100-107.

[1448] Cf. 3.4.3.

[1449] Case C-128/16 P, *Commission v Spain*, ECLI: EU:C:2018:591, para 105. The case is about a deemed fiscal state aid granted via a tax regime applicable to certain finance lease agreements for the purpose of ships.

[1450] The status of limitation is one of the forms of legal certainty protection that regards the EC possibility to investigate tax positions when a determined period of limitation elapses. Procedural time limits stem from a compromise between the need for the judicial review of the legality of the EU acts, and the need to respect legal certainty. As regards this compromise, see Case C-3/59 *Germany v High Authority* [1960] ECR 53, esp 61. 20. See also Schermers and Waelbroeck (n. 305). See Art. 17, Council Regulation (EU) 2015/1589 of 13 July 2015. See also A. van Eijsden and J. van Dam, 'The Impact of European Law on Domestic Procedural Tax Law: Wrongfully Underestimated?', (2010) 19(5) EC Tax Review, 199. See Case T-308/00 *Salzgitter v Commission* ECLI:EU:T:2004:199 [2004] ECR II-1933 and Case C-408/04 P *Commission v Salzgitter* ECLI:EU:C:2008:236 [2008] ECR I-2767.

[1451] Case C-5/89, *Commission v Germany*, ECLI:EU:C:1990:320, para. 17: "*Member State whose authorities have granted aid contrary to the procedural rules laid down in [Art. 107 and Art.108 TFEU] may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a commission decision instructing it to recover the aid. If it could do so, Articles [107] and [108] of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the commission under provisions of the Treaty of their effectiveness*.". See also Case C-310/99, *Italy v Commission*, ECLI:EU:C:2002:143, para. 104.

[1452] EC Final Decision *Amazon*, para 626, citing Joined Cases C-471/09 P to C-473/09 P *Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission* EU:C:2011:521, para. 64; see also Joined Cases C-465/09 to C-470/09

as regards taxpayers, domestic tax rulings cannot provide legitimate expectations since only the "*precise, unconditional assurance"* of the EU institutions may trigger a possible protection.[1453]

As argued in the first Chapter, the legitimate expectations principle has its own doctrine that differs from the legal certainty principle. For instance, the "*precise, unconditional assurance*" required to claim legitimate expectations protection is not required under the doctrine of the legal certainty principle. According to the CJEU jurisprudence, the objectively unforeseeable effect of the law, if any, or of any legal provisions shall be protected by the legal certainty principle. In evaluating the unforeseeable effect of the law, the CJEU exclusively uses EU law and its judgments as a reference without considering assurances provided by other entities.[1454] For example, when there is a well-established case law on a certain EU provision, it is unlikely that the CJEU concedes the legal certainty protection.[1455] The application of a novel interpretation and application of State aid should be foreseeable, even in the absence of precise assurances.[1456]Even in the EC Notice on the recovery of unlawful and incompatible State aid, the principle of legal certainty is distinguished from the principle of legitimate expectations.[1457] The foreseeability test is a core aspect of legal certainty,[1458] and it should at least be present to eventually balance public interest or other principles.[1459]

Moreover, as regards the principle of clarity and definiteness, the CJEU has established a rule of interpretation stating that vague laws shall be interpreted in favor of the addressee.[1460] In case of "*unforeseeable law effect*", the consequence would be that member states would be objectively incapable of foreseeing the State aid qualification, with the result of missing the

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Diputacion Foral de Vizcaya e.a./Commission, EU:C:2011:372, para 150 and Case C-372/97 *Italy v Commission* EU:C:2003:275, para 112.

[1453] Joined Cases T-50/06 T-56/06 and T-60/06 *RENV II, Ireland v Commission, France v Commission, and Italy v Commission*. ECLI:EU:T:2012:134, para. 214.

[1454] Cf: Cpt.2.4.5. In the case at stake, the EC has also retroactively applied the OECD TP guidelines: See Action brought on 22 May 2018, *Amazon EU and Amazon.com v. Commission*, T-318/17: "*Eighth plea in law, alleging that the decision violates the principles of legal certainty, retroactivity, and non-discrimination, and an essential procedural requirement because it assesses the validity of the 2003 ATC by reference to post-dating OECD Guidelines. The decision retroactively and discriminatorily applies, and improperly holds the applicants and Luxembourg to, standards in the 2017 OECD Guidelines on transfer pricing first issued after the Commission opened the procedure under Article 108(2) TFEU, and long after the adoption of the 2003 ATC*". See also Action brought on 14 December 2017, Luxembourg v. Commission, T-816/17, 5th plea in law: "*the recovery of the aid is incompatible with the principle of legal certainty, considering the good faith of the Grand Duchy of Luxembourg in the application of transfer pricing and the fact that the new transfer pricing approach applied by the Commission in the contested decision could not have been foreseen*".

[1455] Case C-61/79, *Denkavit Italiana* [1980] ECR 1205, para. 21; Case C-57/93, *Vroege* [1994] ECR I-04541, paras. 28-30; Joined Cases C-367/93 to C-377/93, *Roders and others* [1995] ECR I-02229, para. 45; Case C-415/93, *Bosman* [1995] ECR I-04921, para. 146; Case C-104/98, *Johann Buchner* [2000] ECR I-3625, para. 40.

[1456] E. Sharpston, 'European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom' (1990) 11(1) Northwestern Journal of International Law & Business 87, 93.

[1457] In the notice, the principle of the protection of legitimate expectations is defined as a corollary of the principle of legal certainty and the Union Courts have applied them in conjunction. See EC, Communication from the Commission, Commission Notice on the recovery of unlawful and incompatible State aid, 2019/C 247/01). However, in the Second Chapter I have spotted the CJEU case where those principles have not been applied in conjunction. Cf: 2.

[1458] T C Hartley, *The Foundations of European Community Law* (6th edn, Oxford University Press, 2007).pg 34.

[1459] Schön argues about a « fine balance" between providing legal certainty and granting illegal benefits to taxpayers. Schön (n. 36). See also P. López, 'The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond', (Oxford University Press, 2015), 93 et seq.

[1460] Case C-169/80 *Administration des Douanes v Gondrand Frères* [1981] ECR 1931, para 17 et seq.

required notification. This impossibility shall be protected or at least should be evaluated and then mitigated by applying the possibility of non-recovery. Lastly, tax rulings are a legal instrument whose main purpose is to provide legal certainty. Depriving such instruments of their main purpose and even strictly applying the lack of protection of the principle of legal certainty appears to be a double denial of the legal certainty principle itself. The EC is entitled to investigate tax rulings, but it is not advisable to apply a restrictive interpretation of the protection of legal certainty precisely because of the peculiar purpose of these legal instruments, which is to provide legal certainty.

5.2. The CJEU Interprets Legal Risk of State Aids Without Considering the Amount at Stake Therefore Risk Cannot be Used as a Tool for Claiming the Protection of the Legal Certainty Principle.

As discussed in the previous Chapter, the US Department of Treasury linked the "*risk concept*" and the legal certainty protection. [1461] In particular, "*neither their internal review nor third-party review and audit of the affected firms by tax and audit professionals signaled in any way that their tax position could possibly trigger State aid inquiry*".[1462] Adopting new enforcement regimes with retroactive effect will hinder companies' "*ability to assess risks*" and plan the future […]. It also undermines the G20 agenda to improve tax certainty.[1463]Before the EC started its investigations in 2014, none of the companies had acknowledged the "*risk of State aid investigations*" in their audited financial statements.[1464]

As questioned in the last Chapter, the CJEU does not use the concept of risk for evaluating whether the cases at stake deserve the protection from the State aid recovery order, on the basis of the legal certainty principle. Therefore, it is not recommendable for taxpayers (or investigated member states) to seek protection based on the principle of legal certainty by supporting the claim with arguments related to the impossibility of calculating the risk because - as stated above - the CJEU does not use risk as a measure of the uncertainty of the law. Although it appears intuitive what risk means, risk is not a well-known concept in the EU law, and in the legal science generally. (Legal) uncertainty is the commonly used concept that indicates how uncertain is the effect of the law, which, in turn, may cause disputes between tax authorities and taxpayer, or between the EC and member states in case of State aid investigations.

[1461] U.S. Dept't of the Treasury, The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings, 56 (2016), para 14.
[1462] Ibid, para 15.
[1463] Ibid, para 1.
[1464] Ibid, para 3.

This study has shown that risk and uncertainty are two distinct concepts. In economics, engineering, and management sciences, risk is considered as the result of severity and probability. When the CJEU is asked for the *ex-post* protection based on the legal certainty principle, it evaluates the level of the uncertainty of the law and its effects, disregarding the impact (severity). It evaluates uncertain legal positions by taking as reference EU law and its judgments in previous similar cases. The CJEU interpretation is perfectly in line with State aid law. It is irrelevant if the amount of unpaid tax is several billions, as in the *Apple* case or just a few euros. Whenever the economic benefit is provided, the financial situation of the undertaking is improved because of State aid. The impact of a state intervention is not relevant. The ability of taxpayers to calculate the probability is an indication of the level of reliability of case law and an indication of the foreseeability of the effect of the law.

5.3. Fiscal State Aid Hallmarks can be a Legal Risk Tool Functioning as a Dispute Avoidance Mechanism for Transfer Pricing Transactions in EU.

As argued in the fourth Chapter, legal risk is not used by the CJEU as a valid measure to evaluate the degree of legal uncertainty since the severity component of risk is disregarded. On the contrary, legal risks are considered by the tax authorities, and suggested by the EC, as the basis to draft dispute avoidance mechanisms (such as APAs and exchange of information mechanisms). Dispute avoidance mechanisms in the form of exchange of information mechanism such as DAC 6, CbCR consider indeed both (legal) risks components: (i) the possible impact at stake (companies with a conspicuous turnover), and ii) some indicators that present a higher likelihood of causing a dispute. The legal risk is used as a tool of selection to limit the amount of information to be exchanged and select only legal risky transactions that can be disputed.

Legal risk is considered specifically by the EC Communication on the work of the JTPF on TP documentation for associated enterprises in EU, which clarifies that for tax administrations, risk assessment is regarded as the most important case selection tool and as a tool for specific inquiries and tax audits. On the other hand, risk assessment may help taxpayers to concentrate pro-actively on "risky" transactions which may require more detailed explanations and documentation and can also help to improve the TP system applied.[1465] The use of risk as a tool for selecting information to be exchanged is also considered by the JTPF, which examined the possibilities of *prior notification* before tax administrations at least before making TP adjustments to avoid disputes.[1466]

[1465] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum on Transfer Pricing Documentation for Associated Enterprises in the EU, COM (2005) 543 final, para 3.2.

[1466] Art. 2.3, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, COM (2007), 71 final.

However - as discussed in the first sub- Chapter - risk is the uncertainty that matters.[1467] Hence, the risk of State aid disputes can be mitigated only if the relevant State aid law uncertainty will be considered ex ante. Domestic dispute avoidance mechanisms, such as APAs, which are valid legal instruments to avoid tax disputes, do not address the risk of State aid. Moreover, the current EU tax directives do not offer a solution for *ex-ante* certainty (limited to *ex-post* disputes such dispute resolutions mechanisms), and they do not cover state aid disputes. In the various EU directives on tax cooperation, in the JTPF report on TP risk management as well as in the EC Risk Management Guide, fiscal State aid risks are never mentioned or cited as a risk factor.

The proposed fiscal *State aid hallmark*s aim at filing this normative gap by specifically addressing the law uncertainty that – for the scope of this thesis – covers fiscal State aid investigation risks, particularly within the tax ruling framework. Within this legal framework, State aid risk indicators are characteristics or features identified as potentially indicative of State aid, which, if met, would require notification. As previously explained, risk is understood precisely as the probability of qualifying as state aid combined with the amount of possible aid. Although the GC states that the *"probability of the existence"* of an aid is not the threshold required to demonstrate that a TP can be qualified as fiscal State aid, the "*probability of existence*" can be relevant for both taxpayer, member states when assessing (*ex-ante* investigations) State aid risk to evaluate when a notification is required or for the EC when assessing which transaction should be investigated. The risk of State aid investigation might also inform the risk assessment of tax administrations taking into the account that the negative risk of recovery lies only with MNEs.[1468]

To bridge the existing regulatory gap, the following list of *'State aid hallmarks'* is proposed. This list does not claim to be exhaustive or complete but still wants to contribute to finding a list of pre-identified risky indicators that will trigger the notification of the deemed stated aid since they are most likely to be disputed.

Before developing the list, it is important to make a preliminary remark about the link between risks and objectives as discussed in Chapter 4. Objectives are a fundamental step for the proper risk assessment since different objectives affect the risk assessment. The link between objectives and risk is reported by the EC in its guide "*Risk Management Guide for Tax Administrations*". Under the State aid risk assessment, since the EC has different objectives of tax authorities, the arm's length standard should be assessed in accordance with the domestic reference framework but in light EU law objectives on competition. The competition function of the arm's length standard is consistent with the EC' assurances that allege that if the OECD

[1467] Cf: 4.3.2.

[1468] Article 16 of 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 (OJ 2015 L 248/9). The Procedural Regulation repealed and replaced Council Regulation (EC) No 659/1999 of 22 March 1999, laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83/1). Article 9 of the Commission Regulation (EC) 271/2008 lays down detailed rules with respect to the method for fixing the recovery interest rate.

Guidelines are followed, the result is *"unlikely"* to give rise to State aid. In the DAC 6 proposal, the EC suggested a specific hallmark concerning TP that was not confirmed in the final version: "*An arrangement or series of arrangements which does not conform with the arm's length principle or with the OECD transfer pricing guidelines, including the allocation of profit between different members of the same corporate group*".[1469] The FIAT case has definitely clarified that State aid evaluation of arm's length transactions should be carried out with reference to the domestic reference system. However, the FIAT case itself did not set any limits when member state's internal reference system refers to the OECD TP guidelines. The EC therefore is competent in assessing possible selective treatment of comparable transactions. This is also relevant because most member states have decided to spontaneously refer to the OECD TP guidelines. In this context, the following State aid hallmarks represent a useful tool for identifying transactions that present a high risk of being disputed by the EC.

The first proposed State aid hallmark is the tax rulings themselves. Contrary to other tax risk assessments, from the State aid risk standpoint, individual tax rulings can be considered as a fiscal *State aid hallmark*. Although the EU JTPG suggests APAs as a method of dispute avoidance mechanism, individual tax rulings not only are not neutral from the risk of State Aid investigations, but they increase the risk of disputes. First of all, the ruling as an act in itself qualifies as a measure. According to Art. 107 TFEU and CJEU jurisprudence, qualifying as a measure is one of the conditions required to qualify as State aid ("any measure"). Moreover, the increased of risk of State aid is based on the increased risk of selectivity. Tax rulings are in their nature an occasion to apply discretionary power by the tax authority. In this regard, the discretion increases the possibility of treating comparable situations differently. Moreover, an individual tax ruling can be the legal basis for shifting the burden of proof of selectivity from the EC to the member states.[1470] Therefore, when the EC selects the TP cases for pre-investigations, it is incentivised to select those cases that present more chances of winning (i.e., with less burden on its side).

A bespoke reference system is another fiscal *State aid hallmark*, since it is the reference system that can most likely make one's tax position selective. Thus, if the tax administration supports that the individual tax ruling (or individual tax position) should be considered as a reference system on its own right, then it is much more likely that the tax ruling is selective. Conversely, if the selected reference system is the general tax law, this tax position is less likely to be regarded as selective.

Certain TP methods present more State aid risks than others**.** The EC states that when TP transactions are compliant with the OECD arm's length principle, that transaction is "*unlikely*" to be qualified as State aid. Among all, the TP CUP method is one of the less risky methods.

[1469] Annex 1 (E1) to the Proposal for a Council Directive amending 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (2017) 236 final.
[1470] See Case C-438/16 P *Commission v France and IFP Énergies Nouvelles*, EU:C:2018:737, para. 111; C-559/12*, France* v *Commission*, EU:C:2014:217, paras 98 and 99.

Unlike other TP methods that compare costs and profits, the CUP method is the only method that compares price directly. The CUP method mitigates the risk of State aid dispute since it requires a direct comparability between competitors, and the competition itself acts as guarantor of the reliability of the arm's length results.

The EC has indicated that tax rulings based on a two-sided TP method are "*less likely*" to deviate from a market outcome. On the contrary, one-sided methods are considered fiscal *State aid hallmarks* because they leave more room for discretion and increase the risk of selectivity. The indirect TP method and, particularly the TNMM, is the method that entails more risk of selectivity since it leaves more room for discretion, providing the possibility to choose the tested party, and the profit level indicator.

Unlike bilateral APAs, individual APAs can be considered as a fiscal *State aid hallmark*s because they do not require an agreement between two member states in tax competition. If competition is considered as a guarantor of arm's length results for transactions between independent companies, tax competition is a guarantor of the agreement concluded between tax authorities under a bilateral APAs. On the contrary, individual tax rulings do not have to be agreed between different member state, thus they can be qualified as a *State aid hallmark*.

Finally, the more fiscal *State aid hallmark*s are fulfilled in the same APA (or in the same transaction), the higher the risk of a dispute.

If the purpose of the EC State Aid Action Plan is to pursue "*Less and better targeted State aid*"[1471] while building a roadmap for State aid reform to improve the "effectiveness", and "predictability" of the State aid regime,[1472] fiscal *State aid hallmark*s are perfectly in line with the State Aid Action Plan since they target only the risky transactions. In the Action Plan for fair and simple taxation supporting the recovery strategy, the EC affirmed that to run tax controls efficiently and effectively, "*tax administrations should rely on risk management techniques to better target tax control*" and "*preventing the possibility of disputes and providing legal certainty to taxpayers would be the primary objective*".[1473] Fiscal State aid hallmarks are therefore in line with this primary objective.

Moreover, fiscal *State aid hallmark*s provide taxpayers and members states with the selected information that help in identifying the TP that should be notified. An extreme amount of information may cause misinformation and waste of resources.[1474] Avoiding the waste of resources is another point that the EC pointed out in its State Aid Action Plan by affirming

[1471] State Aid Action Plan: "*Less and better targeted State aid*": a roadmap for State aid reform 2005-2009, APPENDIX 7, Code of Best Practice for the conduct of State aid control procedures, 2005.
[1472]Ibid.
[1473] Communication from the Commission to the European Parliament and the Council, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM (2020), 312 final.
[1474] A.L. Valembois, La Constitutionnalisation de l'exigence de sécurité juridique en Droit français, Paris, LGDJ, 2005, p.8.

that the most efficient use of resources would be to pursue the largest cases that would have the most value as precedents.[1475]

It must be pointed out that fiscal *State aid hallmark*s present limits. They do not protect taxpayers from EC investigations, but they can contribute to reduce the legal uncertainty that surrounds the state aid investigations by the EC. Moreover, State aid hallmarks are not an exhaustive and definitive list. The list will be updated as clarification from the CJEU evolves.

In conclusion, fiscal State aid hallmarks contribute to providing a response to those stakeholders who have already expressed their preference for more intervention at EU level, specifically on dispute prevention and resolution.[1476] Dispute avoidance mechanisms are considered the most effective way to pursue legal certainty on an *ex-ante* basis with the aim of preventing costly disputes upfront, [1477] and fiscal State aid hallmarks pursue these very purposes.

[1475] S.U.J. Niazi and R. Krever, 'Bespoke tax rulings and profit shifting in the European Union: assessing the EU's options', (2021) Business Law &Taxation, Australian Tax Forum, Vol.36, p.3.

[1476] Responses to the public consultation on the evaluation of the Directive on Administrative Cooperation in taxation, summarized in annex 2 of European Commission. (2019), "*Commission staff working document Evaluation of the Council Directive (EU) no 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC*" (SWD (2019)328 final).

[1477] European Commission's Directorate-General for Taxation and Customs Union, 'Tax Uncertainty: Economic Evidence and Policy Responses', (2017) Taxation Paper n. 67/2017.

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