

# Application of the Principle of Protection of Legitimate Expectations in Recovery of Unduly Paid Subsidies in the Context of Judicial Coherence in the European Union

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## Abstract

*This article addresses the principle of protection of legitimate expectations in the context of recovery of unduly paid sums, with particular emphasis on the role of this principle in domestic legal systems. The subject-matter constitutes part of the broader discussion on the judicial coherence in the European Union and the process of Europeanisation of public law. National courts and public bodies have to enforce the recovery based on EU and national law. It concerns different fields of Union law like common agriculture policy (CAP), structural funds as well as state aid. In this article I will argue that there has been a shift in jurisprudence to apply uniformly Union principles instead of national equivalents in CAP and structural funds. Simultaneously, this new line of case-law triggers a more restrictive interpretation of legitimate expectations on the grounds of effet utile, which in practice seems to exclude protection of beneficiaries vis-à-vis national bodies applying EU law and which is similar to state aid case-law. I claim that although better consistency and effectiveness in the enforcement may have been achieved, the stricter approach may undermine the value of trust and legal certainty in EU administrative law.*

## I Introduction. Legitimate Expectations and Judicial Coherence

The term 'coherence' is being used in many domains of social sciences including law.<sup>1</sup> In legal language the term has manifold manifestations<sup>2</sup>

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<sup>1</sup> Interdisciplinary attempts see for instance: M. Araszkiewicz & J. Šavelka (Eds), *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence* (Dordrecht 2013).

<sup>2</sup> For instance: L.M. Soriano, 'A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice' [2003/3] *Ratio Juris*; N. McCormick, 'Coherence in Legal Justification', in: A. Peczenik, L. Lindahl, G.C. Van Roermund, *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Law* (Lund 1984).

and is being used by legal scholars, lawyers and judges in EU law.<sup>3</sup> The linguistic analysis by Pethick of this notion leads to basic and helpful conclusions that the concept of 'coherence' means 'stick together', either as a one-place or two-place predicate. If an argument is said to cohere, then what is proposed is that it sticks together. How, or in consequence of what, some thing or some things 'stick together' is then answered by the nature of, or particular relation between, the object(s) that cohere. A relation of coherence is a symmetrical relation, a relation of mutual or reciprocal sticking.<sup>4</sup> The necessary condition of coherence is consistency, however, it is never solely sufficient. Consistency in law is the absence of contradictions; coherence on the other hand refers to positive connections. Moreover, coherence in law is a matter of degree, whereas consistency is a static concept.<sup>5</sup>

In EU law, it can be argued that the 'judicial coherence' mainly refers to the issue of how EU material law coheres – as a descriptive question – and how it should cohere – as a normative question – with national 'material' and/or 'procedural' law of Member States. It is necessary to mention that some authors argue that the EU legal order is far from a classical model of hierarchical order of norms. It is rather an interlocking system of jurisdiction of the EU courts and the national courts,<sup>6</sup> interacting systems of law,<sup>7</sup> or 'multi-order', which presupposes the dialogue between the national and EU courts amongst others *inter alia* on the account of preliminary ruling proceedings.<sup>8</sup> With regard to the relationship of material EU law and 'procedural' national law, the principle of procedural autonomy of Member States and the limits imposed by the case-law of CJEU are presupposed with the view to ensuring a proper enforcement of the EU law.<sup>9</sup>

The principle of protection of legitimate expectations may arise against national authorities responsible for the enforcement and implementation of EU

<sup>3</sup> In curia the search engine found 476 hits on 'coherence'.

<sup>4</sup> Detailed analysis of the notion of coherence is presented by S. Pethick, 'On the Entanglement of Coherence' [2014/1] *Ratio Juris*, 130-131.

<sup>5</sup> C. Tjetje, 'The concept of coherence in the Treaty of European Union and the Common Foreign and Security Policy' [1997/2] *European Foreign Affairs Review* 211.

<sup>6</sup> K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' [2007/44] *CML Rev.* 1625. '(...) each of the Member States contributes its own judicial system for the sake of ensuring the effective application and enforcement of Community law, which is indeed in line with the deeper philosophy of unity and diversity underlying the Union itself.'

<sup>7</sup> N. MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (Oxford 1999) 117.

<sup>8</sup> T. de la Mare, C. Donnelly, 'The evolution of the EU, preliminary rulings and EU legal integration: evolution and stasis', in: P. Craig, B. de Búrca (Eds), *The Evolution of EU Law* (Oxford 2011) 2nd edition 391-392.

<sup>9</sup> Procedural law should be understood broadly as all relevant national rules and principles that can be applied with a view to ensuring rights and obligation of EU law. More on it: D.U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the 'Functionalized Procedural Competence' of EU Member States* (Berlin Heidelberg 2011) 12-13.

law. The protection of this principle acquires particular importance where national authorities seek to recover EU monies paid by mistake.<sup>10</sup> Given that judicial coherence has been defined as the relation between EU and national legal systems, the main objective is to clarify the position of legitimate expectations therein. This article deals with the recovery of EU subsidies which is enforced by national authorities (indirect enforcement), and leaves aside recoveries which must be enforced directly by the EU institutions, bodies or agencies (direct enforcement).<sup>11</sup>

With regard to recovery in indirect enforcement, one can distinguish between the recovery of illegal state aid and recovery of other undue paid subsidies. The former relates to individual subsidies in CAP,<sup>12</sup> Structural Funds,<sup>13</sup> over-payment of exports duties<sup>14</sup> and VAT<sup>15</sup> to the advantage of the payer and post-clearance obligations to pay custom duties.<sup>16</sup> This article focuses on CAP and structural

<sup>10</sup> T. Tridimas: *The General Principles of EU Law* (Oxford 2007) 2nd edition 289.

<sup>11</sup> The distinction between centralised and decentralised enforcement of EU law in: M. Dougan, *National Remedies Before the Court of Justice. Issues of Harmonisation and Differentiation* (Oxford 2004) 1-4. Somehow similar distinction is made in German legal theory on direct (direkter Vollzug) and indirect application (indirekter Vollzug) of EU law, see H.W. Rengeling & A. Middeke & A. Gellermann, *Handbuch des Rechtsschutzes in der Europäischen Union* (München 2003).

<sup>12</sup> The agricultural expenditure is financed by two funds, which form part of the EU's general budget: the European Agricultural Guarantee Fund (EAGF) which primarily finances direct payments to farmers and measures to regulate agricultural markets, and the European Agricultural Fund for Rural Development (EAFRD) which co-finances the rural development programmes of the Member States. Source: [ec.europa.eu/agriculture/cap-funding/funding-opportunities/index\\_en.htm](http://ec.europa.eu/agriculture/cap-funding/funding-opportunities/index_en.htm).

<sup>13</sup> European Structural Funds cover inter alia: European Regional Development Fund, European Social Fund, Cohesion Fund, European Maritime and Fisheries Fund and others. Source: [ec.europa.eu/regional\\_policy/en/funding/](http://ec.europa.eu/regional_policy/en/funding/).

<sup>14</sup> The first and fourth subparagraphs of Article 11(3) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (*OJ* 1987 L 351, p. 1), as amended by Commission Regulation (EC) No 2945/94 of 2 December 1994 (*OJ* 1994 L 310, p. 57) ('Regulation No 3665/87') are worded as follows: 'where a refund is unduly paid, the beneficiary shall reimburse the amounts unduly received'.

<sup>15</sup> In a series of judgments, the Court has tested national VAT measures directly against the principles of protection of legitimate expectations and legal certainty. See, *inter alia* Case C-376/02 *Stichting 'Goed Wonen' v. Staatssecretaris van Financiën* [2005] ECR I-3445, paragraph 34; Case C-7/02 (Joined Cases C-487/01, C-7/02) *Groep Gemeente Leusden (C-487/01), Holin Groep BV cs (C-7/02) and Staatssecretaris van Financiën* [2004] ECR I-5337, paragraph 69; Case C-396/98 *Grundstücksgemeinschaft Schloßstraße GbR v. Finanzamt Paderborn* [2000] ECR I-4279, paragraph 44; Case C-381/97 *Belgocodex SA v. Belgian State* [1998] I-8153, paragraph 26; Joined Cases C-181/04 to C-183/04 *Elmeke NE v. Ypourgos Oikonomikon* [2006] I-08167.

<sup>16</sup> Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, the purpose of which is to protect the legitimate expectation of an importer in recovery of customs duties – to this effect see Case C-251/00 *Iluminação e Electrónica Lda v. Chefe da Divisão de Procedimentos Aduaneiros e Fiscais/Direcção das Alfândegas de Lisboa, and Ministério Público* [2002] ECR I-10433, paragraph 39. See as well Article 219 of the (new) Union Customs Code – Regulation 952/2013, which entered into force on 1 November 2013, but it is not yet applicable, due to the lack of the necessary implementing provisions.

funds in comparison with the state aid recovery procedure<sup>17</sup> with a view to clarifying the function of legitimate expectations and judicial coherence therein.

In particular, CAP and structural funds are often referred to as 'shared administration' which can be defined as consisting of forms of administrative cooperation for the management of Union programmes, where the Commission and the Member States have distinct administrative tasks which are interdependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the EU policy to be implemented successfully.<sup>18</sup> National law is employed to implement Union law by way of shared cooperation between them.<sup>19</sup> From this point of view, by examining the function and place of the principle of legitimate expectations, one can observe the way in which the process of Europeanisation of Public Law takes place.<sup>20</sup>

## 2 Legitimate Expectations in Recovery Procedures

### 2.1 General Remarks on the Union Principle of Legitimate Expectations

Before carrying out the detailed analysis on the function of legitimate expectations in recovery, it is important to summarize general information on this principle as set out in the Union law.

The principle of protection of legitimate expectations forms part of the EU legal order.<sup>21</sup> The Court derived this legal concept directly from German law where it is known as *Vertrauensschutz*.<sup>22</sup> It is a general principle of EU law to the effect that any failure to comply with it is an "infringement of the Treaties or of any rule of law relating to their application" within the meaning of

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<sup>17</sup> It should be noted that administrative procedures under Article 108 TFEU, when read in conjunction with the procedural provisions of Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ L 83, p. 1) which regulate the monitoring of the granting and recovery of State aid, differ widely from the administrative procedures for the monitoring of EU funding, in particular procedures regarding the cancellation, reduction and the recovery of financial assistance that has already been agreed or granted.

<sup>18</sup> H. Hofmann & G. Rowe & A. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011) 15-16.

<sup>19</sup> S. Prechal & R.J.G.M. Widdershoven & J.H. Jans 'Introduction', in: J.H. Jans, S. Prechal, R.J.G.M. Widdershoven (Eds) *Europeanisation of Public Law* (Groningen 2015) 7; L.F.N. Besselink, *A composite European Constitution* (Groningen 2007); P. Craig uses term 'shared management' – P. Craig 2012 *supra* 1, 79-108.

<sup>20</sup> S. Prechal & R.J.G.M. Widdershoven & J.H. Jans, 'Introduction', in: J.H. Jans, S. Prechal, R.J.G.M. Widdershoven (Eds) *Europeanisation of Public Law* (Groningen 2015) 8.

<sup>21</sup> Case 112/77 *Töpper* [1978] ECR-1019.

<sup>22</sup> X. Groussot, 'General Principles of Community Law' 23-26 The Hogendorp Papers (6) (Groningen 2006); S. Schönberg, *Legitimate Expectations in Administrative Law* (Oxford 2000).

Article 263 TFEU. The violation of that principle may constitute the legal basis for action for damages under Article 340 of TFEU.<sup>23</sup>

The principle of legitimate expectations protects individuals against arbitrary actions on the part of a state (or public authority) by requiring it to act as far as possible in conformity with legitimate expectations to which it has given rise to.<sup>24</sup> In this sense, this principle is corollary to legal certainty<sup>25</sup> and the rule of law.<sup>26</sup> The legal subjects ought to plan their lives by knowing the legal consequences of their actions.<sup>27</sup> The principle of legitimate expectations aims at guaranteeing the foreseeability of legal relations governed by EU law.<sup>28</sup> That imperative must be observed all the more strictly in the case of rules liable to have financial consequences<sup>29</sup> and relates to the 'expectations' of a subject of law with regard to his/her legal situation based on the action of a public authority, the precondition of which is good faith, since it cannot be successfully invoked by a person who themselves manifestly have not complied with EU legislation.<sup>30</sup> To this end the CJEU carries out a test of 'sufficiently prudent economic operator with respect to expectations'.<sup>31</sup> In other words, expectations cannot be 'random', but instead reasonable in the legal context in order to become the basis for the prediction. This test of legal knowledge is connected with principle of *ignorantia iuris nocet* and a general rule of law requirement that legal subjects should be able to know their legal obligations, rights and eventually

<sup>23</sup> More on the principle of legitimate expectations for instance: J. Schwarze, *European Administrative Law* (London 2006) 2nd edition, S. Schönberg 2000, *supra* 2.1.

<sup>24</sup> J.E. van den Brink, W. den Ouden, S. Prechal, R.M.G.M. Widdershoven 2015 *supra* 1, 208.

<sup>25</sup> H.G. Schermers & D.F. Waebroek, *Judicial Protection in the European Union* (The Hague, London, New York 2001) 6th edition 79; J. Schwarze 2006 *supra* 2.1., 946. This scholar adds that the Court has failed to adopt a decisive position on the fundamental theoretical question whether there is a link – in the sense of one being derived from the other – between legal certainty and legitimate expectations; T. Tridimas 2007, *supra* 1, 242 where it is argued that a specific expression of legal certainty is the protection of legitimate expectations. See as well: J.E. van den Brink, W. den Ouden, S. Prechal, R.M.G.M. Widdershoven 2015 *supra* 1, 208.

<sup>26</sup> J. Schwarze 2006 *supra* 2.1., 946: 'The principle of legal certainty, as a structural principle based on objective criteria, has been derived mainly from the rule of law concept. The principle of legitimate expectations appears to be an expression, taking the form of a subjective right, of legal certainty, which is equal in the rank of hierarchy of rules.'

<sup>27</sup> Case C-63/93 *Fintan Duff and others v. Minister for Agriculture and Food and Attorney General* [1996] ECR I-569, paragraph 20: 'The principle of legal certainty, which requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable.'

<sup>28</sup> Case T-348/03 *Koninklijke Friesland Foods NV v. Commission* [2007] II-00101, paragraph 125.

<sup>29</sup> Case C-94/05 *Emsland-Stärke GmbH v. Landwirtschaftskammer Hannover* [2006] ECR I-2619, paragraph 43; case C-68/05 P *Koninklijke Coöperatie Cosun UA v. Commission of the European Communities* [2006] I-10367, paragraph 79.

<sup>30</sup> H.G. Schermers & D.F. Waebroek 2001 *supra* 2.1., 80 and cited case law therein.

<sup>31</sup> Case 265/85 *Van den Bergh en Jurgens BV and Van Dijk Food Products (Lopik) BV v. Commission of the European Communities* [1987] 0155 paragraph 44; Case T-336/94 *Efisol SA v. Commission of the European Communities*, 1996 II-01343, paragraph 31; Case T-489/93 *Unifruit Hellas EPE v. Commission of the European Communities* 1994 II-01201, paragraphs 51-53.

the legal consequences of their actions. It affects not only the way the law should be adopted,<sup>32</sup> but also how the law should be applied and interpreted with a view to ensuring the foreseeability and eventually trust in the law, public authorities and courts.

This principle constitutes part of the European Code of Good Administrative Behaviour adopted by the European Ombudsman.<sup>33</sup> K. Lenaerts and P. Van Nuffel classified this principle amongst 'principles of sound administration'.<sup>34</sup> It constitutes a binding standard for the EU public administration, but also for Member States in the field of application of Union law.

The CJEU has not proposed a comprehensive definition of legitimate expectations. For instance in *Mavrides* the Court held that: 'the right extends to any individual who is in a situation in which it appears that the administration's conduct has led him to entertain reasonable expectations.'<sup>35</sup> It rather stipulates the premises and sources of expectations to be qualified as legitimate. There are legitimate expectations if there is a clear and precise commitment from EU.<sup>36</sup> The source of the expectations must originate from authorized and reliable sources.<sup>37</sup> It is also settled case-law that, in principle, the communication of an incorrect interpretation of EU legal provisions does not, by itself, constitute a wrongful act.<sup>38</sup> Eventually, the CJEU after establishing the existence of legitimate expectations will have to strike a balance with public EU interest. In general, *contra legem* legitimate expectations is prohibited.

Acceptable sources of legitimate expectations are administrative decisions, promises and assurances given by competent authorities, 'soft law' measures, like guidelines, notices and other policy rules as well as established administrative practices. In principle, the failure to act by an institution which could ad-

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<sup>32</sup> 'Objective' conditions such as the legal provisions should be clear and precise, the conditions on the publication and entry into force of legal acts. See for instance: *Legislative drafting. A Commission Manual*: [ec.europa.eu/smart-regulation/better\\_regulation/documents/legis\\_draft\\_comm\\_en.pdf](http://ec.europa.eu/smart-regulation/better_regulation/documents/legis_draft_comm_en.pdf)

<sup>33</sup> Article 10 in the European Code of Good Administrative behaviour: [www.ombudsman.europa.eu/en/resources/code.faces#/page/1](http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1).

<sup>34</sup> K. Lenaerts, P. Van Nuffel, *Constitutional Law of the European Union* (London 2005) 2nd edition 713-714.

<sup>35</sup> Case 289/8 *Mavrides v. European Parliament* [1983] E.C.R. 1731 paragraph 21.

<sup>36</sup> Case T-123/89 *Jean-Louis Chomel v. Commission of the European Communities* [1990] II-00131, paragraph 25-26; Case T-46/93 *Fotini Michaël-Chiou v. Commission of the European Communities* [1994], FP-II-00929, paragraph 67.

<sup>37</sup> Case 188/82 *Thyssen AG v. Commission of the European Communities* [1983] 03721, paragraph 11: 'The argument concerning the promise allegedly made by certain Commission officials must also be rejected, since no official can give a valid undertaking not to apply Community law. No legitimate expectation can therefore have been aroused by such a promise, even if one was made'.

<sup>38</sup> Joined Cases 19, 20, 25 and 30-69 *Denise Richez-Parise and others v. Commission of the European Communities* [1970], 00325, paragraph 36 and 37.

versely affect an individual can create legitimate expectations only under very limited and restricted circumstances.<sup>39</sup>

The CJEU has referred to the concept of legitimate expectations in the context of *inter alia* retroactive legislation, revocations of individual decisions and recovery cases. Although these legal problems have common grounds, given the differences between them one can argue that it is better to examine the functioning of legitimate expectations separately.

## 2.2 Legitimate Expectations and Legality

Legitimate expectations in recovery procedures are determined by the construction of the liability in recovery and the underlying concept of legality. It is a matter of ascertaining whether the obligation to demand repayment is defined in objective terms by the legal system; namely whether the obligation stems exclusively from the *objective* circumstance that the sum received was not due or whether it is dependent upon an additional condition, of a so-to-speak *subjective* nature, like the concept of legitimate expectations,<sup>40</sup> linked to the recipient's awareness of the undue nature of the aid received.<sup>41</sup> The presumption is that rules and principles with the effect of precluding the recovery should be treated as an exception to the recovery, otherwise it would endanger the whole enforcement of law. In fact, the system of subsidies in the EU is based on compliance by the recipient with the conditions for the financial assistance; non-compliance or a manifest infringement of such conditions by the recipient means that they can no longer rely on the principles of the protection of legitimate expectations.<sup>42</sup> 'Objective' facts of infringement in the case-

<sup>39</sup> Case 223/85 *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v. Commission of the European Communities* [1987] O4617.

<sup>40</sup> Legitimate expectations can be treated a 'subjective concept' with the aim to protecting the interests of beneficiaries in the event of mistake of public authority and it is at odds with the 'objective' concept of illegality which triggers the recovery of EU subsidy. The subjectivity denotes two interlinked features: (1) the good faith of a beneficiary understood as a belief (expectation) that the subsidy has been granted legally, which per se excludes any form of fraudulent conduct (2) the test of 'prudent economic agent' that relates to the legal knowledge of individual and is grounded in experience as a 'professional' able to predict their legal situation which can be subject to a change and under certain conditions. As such the test may result in different outcomes depending on who is the addressee of a subsidy (e.g. different test for an individual farmer or large company).

<sup>41</sup> Opinion of AG La Pergola in Case C-366/95 *Landbrugsministeriet – EF-Direktoratet v. Steff-Houllberg Export I/S, Nowaco A/S, Nowaco Holding A/S and SMC af 31/12-1989 A/S* [1998] I-02661, paragraph 3.

<sup>42</sup> Case T-142/97 *Eugénio Branco Lda v. Commission of the European Communities* [1998] ECR-II-3567 paragraph 97 and 105; Case T-182/96 *Partex – Companhia Portuguesa de Serviços SA v. Commission of the European Communities* [1999] ECR II-2673, paragraph 190; Case 67/84 *Sideradria SpA v. Commission of the European Communities* [1985] ECR 3983, paragraph 21.

law usually relates to the ‘manifest infringement’ of the rules in force.<sup>43</sup> Legitimate expectations that the beneficiary may have that the assistance would be paid to it is extinguished as soon as they commit an ‘irregularity’.<sup>44</sup> Legitimate expectations is not an absolute principle, important though it may be, and cannot be applied in absolutist manner, which always takes priority.<sup>45</sup>

Therefore, the function of legitimate expectations in recovery must be restricted to the exceptional factual and legal circumstances pertaining to the case at hand. The principle of legitimate expectations provides the citizens with trust in relation to EU institutions, organs and bodies, as well as Member State authorities when applying EU law. Sometimes rigorous application of law can lead to unacceptable results undermining the value of trust and can amount to the arbitrariness or abuse of law. Hence the main function of legitimate expectations is to counterbalance unacceptable, alleged breaches of trust and/or to mitigate the abuse of law.<sup>46</sup>

On the other hand, one can argue that by applying the objective approach to liability by referral to facts of irregularity which triggers the obligation to recover, the legal system provides for greater predictability, though strict, than in liability which takes into account the ‘subjective’ concept of legitimate expectations. The main justification for this would be the value of justice (acceptable result of adjudication) rather than legal certainty.

### 2.3 Legitimate Expectations, *Effet Utile* and Uniform Application of EU law

On the top of general considerations regarding the nature of illegal recovery and implicit conflict between legitimate expectations and legal-

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<sup>43</sup> The principle of the protection of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force. For instance Case 67/84 *Sideradria*, paragraph 21.

<sup>44</sup> Case C-199/03 *Commission v. Ireland* [2005] ECR I-8027, paragraph 64.

<sup>45</sup> The CJEU has indicated that, whilst it is important to ensure compliance with requirements of legal certainty which protect private interests, those requirements must be balanced against requirements of the principle of legality which protect public interests, and precedence must be accorded to the latter when the maintenance of irregularities would be likely to infringe the principle of equal treatment. See, in particular Joined Cases 42/59 and 49/59 *SNUPAT v. High Authority* [1961] ECR 53, at pages 86 to 88, and Case 14/61 *Hoogovens v. High Authority* [1962] ECR 253, at pages 269 to 275, Case T-551/93 *Industrias Pesqueras Campos SA and Transacciones Maritimas SA and Recursos Marinos SA and Makuspesca SA v. Commission of the European Communities* [1996] II-00247, paragraph 76.

<sup>46</sup> Opinion of AG Darmon in Case 210/87 *Remo Padovani and the successors of Otello Mantovani v. Amministrazione delle finanze dello stato* [1988] 06177 paragraph 32: ‘Since they are principles which, by definition, are intended, for the sake of a balance between equity and the rigour of the law, to protect unlawful situations from a strict application of the law, one may hesitate to give the *Maizena* judgment an interpretation which would rob them of a large part of their effect.’

ity, there are other factors specific to the indirect enforcement of recovery of EU subsidies which affects the functions of legitimate expectations. I will refer to M. Dougan's analysis with respect to the CJEU's intervention in domestic systems. According to the aforementioned author, such intervention may be rationalized and assessed along two complementary axes: the imperative of effectiveness and the imperative of uniform application of law.<sup>47</sup>

With regard to imperative of effectiveness, the purpose of the effective recovery may trigger the imposition of adjustments to national rules. Legitimate expectations may undermine recovery, and thus simultaneously the *effet utile* of EU law.<sup>48</sup> In this regard, effectiveness<sup>49</sup> can be at odds with legitimate expectations. There is also a risk that national authorities can make generous use of assurances which could undermine recovery. In CAP and structural funds, legitimate expectations may endanger EU financial interests. However, excluding any conduct of national authorities as a basis for legitimate expectations does not merely reduce the scope of this principle, but rather negates its entire function on account of the fact that it is usually domestic authorities that grant subsidies. In state aid the conduct of competent national authorities is not sufficient to constitute grounds for legitimate expectations due the exclusive competence of the Union in competition law.<sup>50</sup> As a result of this exclusive competence, legitimate expectations will most likely come into play where the undertaking can rely on a statement of the EU legislature itself.<sup>51</sup>

With regard to the imperative of uniformity legitimate expectations is not a recognised legal principle in all Member States and it may have different meanings in Members States in which it is recognised.<sup>52</sup> The imperative of

<sup>47</sup> M. Dougan 2004 *supra* 1, 65.

<sup>48</sup> M. Dougan 2004 *supra* 1, 65.

<sup>49</sup> K. Lenaerts & I. Maselis & K. Gutman, *European Union Procedural Law* (Oxford 2014) 2nd edition, 110. According to these authors there are three main expressions of the principle of effectiveness in the case law: first, the principle of effective judicial protection; second, the full effectiveness of Union law in relation to upholding the principle of the primacy of Union law vis-à-vis national (procedural) law; and third, the interface between national law on procedure and sanctions and the Union framing principle of equivalence and effectiveness (i.e. the principle of effectiveness *sensu stricto*).

<sup>50</sup> Case C-681/11 *Bundeswettbewerbshörde, Bundeskartellanwalt v. Schenker and Others* published in the electronic Reports of Cases (Court Reports – general); Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2Polska* [2011] ECRI-3055.

<sup>51</sup> In competition law see for instance an analysis by S.B. Völcker, 'Ignorantia legis non excusat and the Demise of National Procedural Autonomy in the Application of the EU Competition Rules: Schenker' [2014/51] *CML Rev.* 1508.

<sup>52</sup> To that effect see for instance: J.E. van den Brink, W. den Ouden, S. Prechal, R.M.G.M. Widdershoven *supra* 1, 227-232; J.M. Woehrling, 'Les principes de sécurité juridique et de confiance légitime dans la jurisprudence administrative française: un exemple de réception en droit français d'un principe européen d'origine allemande', in: U. Becker, A. Hatje, M. Potacs & N. Wunderlich (Eds), *Verfassung und Verwaltung in Europa, Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Baden-Baden 2014) 437-452, P. Boymans & M. Eliañtonio, 'Europeanization of Legal Principles? The influence of the CJEU's Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom' [2013/4] *EPL*.

uniformity demands equality of treatment between the Member States. It is apparent that differences between national standards of judicial protection, including the protection of legitimate expectations, results in the unequal enforcement of Treaty policy across the EU territory.<sup>53</sup>

In CAP and structural funds, the case-law has been inconsistent whether to apply national or EU principles. Moreover, until recent cases, it can be argued that previous case-law on legitimate expectations in recovery cases, with some exceptions, had been more lenient than in state aid case law. It seems that now the approach of the CJEU has changed. Both aspects will be subject to analysis in this article.

### 3 Legitimate Expectations in Recovery of Unduly Paid Subsidies in CAP and Structural Funds

#### 3.1 Concept of Recovery and Irregularity

As described above, CAP Funds and structural funds have shared administration<sup>54</sup> and both are governed with very similar logic and legal provisions on recovery. However, it should be noted that in relation to agricultural subsidies, EU law codifies the principle of legitimate expectations for recovery. Article 70(3) of Regulation (EC) No 809/2014<sup>55</sup> provides that the repayment obligation does not apply if the payment was made by error of the competent authority or of another authority and if the error could not reasonably have been detected by the beneficiary. In the second subparagraph, it is stated that where the error relates to certain factual elements, the first subparagraph shall only apply if the decision to recover was not communicated within 12 months of the payment. The Member States must apply the codified versions of the

<sup>53</sup> M. Dougan 2004 *supra* 1, 66.

<sup>54</sup> H. Hofmann & G. Rowe & A. Türk 2011 *supra* 1, 348-359; P. Craig 2012 *supra* 1, 79-108. For instance, in structural funds, the determining concept is that of decentralization, pursuant to which the national authorities enjoy the widest possible autonomy in processing applications for funding and supervising continuously the proper granting and utilization of financial assistance. This principle is, however, subject to exceptions: inasmuch as the Commission is involved in the process of granting assistance, it is empowered to carry out on-the-spot investigations, and it is endowed with specific decision-making powers of cancellation or suspension of EU financial assistance, wholly or partially, and of ordering its recovery. This means among others that the Commission does not make payments directly to the beneficiaries of aid as this task is delegated to the Member States.

<sup>55</sup> Commission Implementing Regulation (EU) No 809/2014 of 17 July 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system, rural development measures and cross compliance, *OJ L* 227, 31.7.2014, p. 69-124.

principles in all cases.<sup>56</sup> With regard to other EU subsidies, Union law does not provide for an exhaustively codified EU principle of legitimate expectations.

In any case, the concept of irregularity is pivotal to set out the obligation to recover of EU subsidies.<sup>57</sup> This notion is defined in Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests,<sup>58</sup> according to which 'irregularity' is any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure. Article 4(4) provides that the irregularity shall not be regarded as a penalty;<sup>59</sup> the purpose of recovery is to regain or restore of something lost or taken away. No distinction of a quantitative or qualitative nature is to be drawn concerning the irregularities which may give rise to reductions in assistance.<sup>60</sup> Whether an irregularity causes major loss, or whether an irregularity is of a 'technical nature' is likewise immaterial.<sup>61</sup> It must be recalled that the exercise of any discretion, by the Member State in question, to decide whether or not it would be expedient to demand repayment of European Union funds unduly or irregularly granted would be inconsistent with the duty imposed on its authorities by the first subparagraph of Article 23(1) of Regulation No 4253/88 to recover any amounts unduly or irregularly paid.<sup>62</sup> On the other hand, the concept of 'irregularity', within the meaning of Regulation No 2988/95, refers to the infringement of a provision of EU law resulting from an act or omission by an economic operator. It follows that when an export refund has been wrongly paid to an operator owing to an error on the part of the national authorities, such a situation is not an 'irregularity' within the meaning of Regulation No

<sup>56</sup> see analysis of the case law in: J.E. van den Brink, W. den Ouden, S. Prechal, R.M.G.M. Widdershoven 2015 *supra* 1, 219-221. Similar codified principle of legitimate expectation can be found in Article 220 of the Community Customs Code).

<sup>57</sup> With regard to CAP, Article 2 of Regulation (EU) No 1306/2013 refers to the notion of irregularity within the meaning of Article 1(2) of Regulation (EC, Euratom) No 2988/95.

<sup>58</sup> OJ L 312, 23.12.1995 p. 0001-0004.

<sup>59</sup> This has been confirmed by the Court of Justice: 'As regards the obligation to make restitution for advantage improperly received by means of an irregular practice, the Court has already held that obligation is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from the EU rules had not been observed, so that that advantage becomes an advantage wrongly received.' See for instance Case C-158/08 *Agenzia Dogane Ufficio delle Dogane di Trieste v. Pometon SpA. Pometon* [2009] I-04695, paragraph 28.

<sup>60</sup> Case C-199/03 *Commission v. Ireland* [2005] ECR I-8027, paragraph 30.

<sup>61</sup> Opinion of AG Sharpston in Case C-465/10 *Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration v. Chambre de commerce et d'industrie de l'Indre* [2011] I-14081, paragraph 41.

<sup>62</sup> Joined Cases C-383/06 - C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] I-1561, paragraph 38.

2988/95.<sup>63</sup> Consequently, it can be argued that in the event of illegality owing to national authorities, it is possible to plea legitimate expectations by the beneficiary. The Court of Justice has pointed out that Regulation No 2988/95 merely lays down general rules for supervision and penalties for the purpose of safeguarding the European Union's financial interests. It is therefore on the basis of other provisions, namely (where appropriate), on the basis of sector-specific provisions, that the recovery of misused funds must be carried out.<sup>64</sup>

### 3.2 National or Union Principle of Legitimate Expectations?

The very basic question is which principle to apply in recovery. In the absence of an EU rule, national public authorities have to recover the undue subsidy under their domestic laws, subject to limitations imposed by EU law within its doctrine of procedural autonomy.<sup>65</sup> Consequently, the very first step is to assess whether or not a specific recovery is governed by the EU law. At the same time, Union law obliges compliance with the Union's general principles whenever domestic authorities implement or apply EU law.<sup>66</sup> Thus, there are two possible ways to handle this problem: (1) either the application of a national principle, if it exists, as part of the procedural autonomy of Member States in absence of EU rule, or (2) to apply EU principles, notwithstanding the absence of an EU rule and without taking into consideration whether national law allows or prohibits the legitimate expectations in recovery procedures. The former ensures the national procedural autonomy, whereas the latter safeguards the equal treatment and the uniform application of EU law.

#### 3.2.1 Application of the National Principle of Legitimate Expectations

The ruling in *Deutsche Milchkontor*<sup>67</sup> seems to me to illustrate perfectly the basic principles of the matter. Indeed, in this case the Court of Justice accepted the application of a national principle of legitimate expectations

<sup>63</sup> Case C-281/07 *Bayerische Hypotheken- und Vereinsbank* [2009] ECR I-91, paragraphs 20 to 22.

<sup>64</sup> To that effect, Case C-465/10 *Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration v. Chambre de commerce et d'industrie de l'Indre* [2011] I-14081, paragraph 33. With regard to Structural Funds, Article 23 of Regulation No 4253/88 provides that Member States shall take the necessary measures to recover any amounts lost as a result of an irregularity or negligence. Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member States shall be liable in the alternative for reimbursement of any sums unduly paid.

<sup>65</sup> On the notion of procedural autonomy see: D.U. Galetta 2011 *supra* 1.

<sup>66</sup> To this effect see: Case C-8/88 *Germany v. Commission* [1990] I-2321, paragraph 13.

<sup>67</sup> Case 205/82 - 215/82 *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany* [1983], *Rec.* p. 02633.

in the recovery of unduly paid subsidies for the first time. The Court of Justice followed *Ferwerda*,<sup>68</sup> in which it held that the EU law did not preclude the application of the Dutch principle of legal certainty in the proceedings for the recovery by the authorities of the Member States of sums paid in error.<sup>69</sup>

The Court of Justice ruled that Article 8(1) of Regulation No 729/70 did not constitute the legal basis authorizing the national authorities to bring actions to recover unduly-paid aids from their recipients and that such actions are governed by national law.<sup>70</sup> According to this provision Member States must take the measures necessary to recover sums lost as a result of irregularities or negligence. Consequently, it constructed legitimate expectations within the limits imposed on the procedural autonomy of Member States.

Firstly, the application of national law must not hinder the effectiveness of EU law. That would be the case, in particular, if such an application made it impossible in practice to recover sums improperly granted<sup>71</sup>. It is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of EU law, a task which may lead it to refrain from applying, if need be, a national rule preventing full effectiveness of EU law or to interpret a national rule which has been drawn up with only a purely domestic situation in mind (requirement of effectiveness).<sup>72</sup> Secondly, national legislation must also be applied in a manner which is not discriminatory compared to procedures for deciding similar national disputes (requirement of equivalence).<sup>73</sup>

In addition, the EU's interest in recovering aid which has been received in breach of the conditions under which it was granted must be taken fully into consideration in assessing the interests in question.<sup>74</sup>

One of consequences of *Deutsche Milchkontor* is that the protection of legitimate expectations (or the absence of such protection) is the exclusive domain of national law, with the effect that EU principles of legitimate expectations and legal certainty are precluded from application and only national principles are to be applied. However, national court assessment must take into account EU interests in recovery. The Court of Justice was aware that allowing national principles may lead to the inconsistent application of EU law and unequal treatment. In that regard it held that:

<sup>68</sup> Case 265/78 *H. Ferwerda BV v. Produktschap voor Vee en Vlees* [1980] 00617.

<sup>69</sup> Case 205/82 - 215/82 *Deutsche Milchkontor*, paragraph 21.

<sup>70</sup> Case 210/87 *Remo Padovani*, paragraph 20.

<sup>71</sup> Case 205/82 - 215/82 *Deutsche Milchkontor*, paragraphs 21 and 22.

<sup>72</sup> See *inter alia* to this effect, Case 106/77 *Simmmenthal* [1978] ECR 629, paragraph 16; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 25; Case C-253/00 *Muñoz and Superior Fruiticola* [2002] ECR I-7289, paragraph 28; Case C-443/03 *Götz Leffler v. Berlin Chemie AG* [2005] ECR I 9611, paragraph 51.

<sup>73</sup> Case 205/82 - 215/82 *Deutsche Milchkontor*, paragraph 23.

<sup>74</sup> Case 205/82 - 215/82 *Deutsche Milchkontor*, paragraph 32.

'If disparities in the legislation of Member States proved to be such as to compromise the equal treatment of producers and traders in different Member States or distort or impair the functioning of the common market, it would be for the competent Community institutions to adopt the provisions needed to remedy such disparities.'<sup>75</sup>

Therefore, the Court of Justice recognised it was not capable of mitigating these shortcomings by providing other, non-literal interpretations of Article 8(1) of Regulation No 729/70.

*Padovani*<sup>76</sup> is a good example depicting this consequence. In concerns Italy, a Member State whose administrative law does not recognise this principle in recovery procedure. The case related to insufficient EU levies, which were not levied due to incorrect application of EU law by national competent authorities and which was only realised in the preliminary rulings in *Frecassetti* with *ex tunc* effect.<sup>77</sup> The Court of Justice stated that since EU law did not govern the condition of recovery concerning the protection of legitimate expectations of traders, that the question is governed by national law<sup>78</sup>. Should the national law applicable concerning the detailed rules and conditions for recovery not contain a principle of protection of legitimate expectations, EU law does not preclude the application of national law in that form, provided that comparable and purely national debts are not governed by a different principle.<sup>79</sup>

To conclude, in the first phase of case-law the Court of Justice treated national legitimate expectations as part of the procedural autonomy of Member States. This case law had been followed in other judgments, not only in CAP,<sup>80</sup> but in structural funds as well.<sup>81</sup> It should be noted that the subsequent case law, like *Martin Huber*, required prior enquiry on the good faith of the beneficiary of the aid in relation to the regularity of the aid itself,<sup>82</sup> which extends the uniformity with regard to the scope of protection of legitimate expectations. This will be described later in this article.

<sup>75</sup> Case 205/82 - 215/82 *Deutsche Milchkontor*, paragraph 24.

<sup>76</sup> Case 210/87 *Remo Padovani*.

<sup>77</sup> Case 113-75 *Giordano Frecassetti v. Amministrazione delle finanze dello Stato* [1976], 00983.

<sup>78</sup> Case 210/87 *Remo Padovani*, paragraph 21.

<sup>79</sup> Case 210/87 *Remo Padovani*, paragraph 25.

<sup>80</sup> Case C-80/99 do C-82/99 *Flemmer and Others* [2001], I-07211; Case C-366/95 *Landbruksministeriet v. Steff-Houlberg Export* [1998], I-2661, C-298/96 *Oelmühle Hamburg and Schmidt Söhne v. Bundesanstalt für Landwirtschaft und Ernährung* [1998], I-4767.

<sup>81</sup> Case C-158/06 *Stichting ROM-projecten v. Staatssecretaris van Economische Zaken* [2007] I-05103.

<sup>82</sup> Case C-336/00 *Martin Huber* [2002] I-7699; more in this subject matter see: D.U. Galetta 2011 *supra* 1, 40.

This outcome of *Deutsche Milchkontor* was appraised positively by scholars.<sup>83</sup> In particular, Tridimas argues that:

‘[*Deutsche Milchkontor*] may be seen as an invitation to diversity but, as a matter of judicial policy, makes good sense. In the absence of Community harmonization measures, reliance on doctrines of national law is the most efficient and, indeed, the only pragmatic approach. By relying on national rules of procedure and remedies, the ECJ gains legitimacy. It heeds classic doctrines of national administrative law whilst, at the same time, time extending its franchise by entrusting national courts to act as its agents and infusing Community-wide standards through the preliminary reference dialogue.’<sup>84</sup>

However, this case-law has not been consistently applied and it seems that the new jurisprudence refuses the main rationale of *Deutsche Milchkontor*.

### 3.2.2 Application of the Union Principle of Legitimate Expectations

In *Krücken*<sup>85</sup> the Court of Justice commenced with the line of jurisprudence running counter to *Deutsche Milchkontor*. In this ruling, the Court of Justice did not treat legitimate expectations as part of procedural autonomy, but rather adjudicated on the assumption that each application of EU law, when needed, shall trigger the EU principle of legitimate expectations as a superior rule of EU law, since it ensures the uniform procedure of recovery. The discrepancy between these two lines of case law is evident in *Lageder*<sup>86</sup> in which the Court of Justice did not follow *Deutsche Milchkontor*, despite the opinion of AG Darmon who favoured the application of national legitimate expectations within procedural autonomy. The Court of Justice concluded that national bodies should apply the EU principle. Similarly conflicting opinions occurred in *Steff-Houlberg Export*.<sup>87</sup> In this case AG Mancini decided to follow *Krücken* and *Lageder*, whereas the Court of Justice ruled on the basis of *Deutsche Milchkontor*.

<sup>83</sup> T. Tridimas 2007 *supra* 1, 290. On the other hand M. Dougan interlinks *Deutsche Milchkontor* with the need to ensure individual rights: ‘Clearly, the Court’s approach to the repayment or recovery of wrongly granted subsidies is closely aligned to the current period of general case-law concerning national remedies and procedural rules for the enforcement by individuals of their subjective Treaty rights’, M. Dougan 2004 *supra* 1, 345.

<sup>84</sup> T. Tridimas 2007 *supra* 1, 290.

<sup>85</sup> Case 316/86 *Hauptzollamt Hamburg-Jonas v. Firma P. Krücken* [1988] 02213.

<sup>86</sup> Joined Cases C-31/91 to C-44/91 *SpA Alois Lageder and others v. Amministrazione delle Finanze dello Stato* [1993] I-01761.

<sup>87</sup> Case C-366/95 *Steff-Houlberg Export I/S*.

*Krücken* and *Lageder* departed from *Deutsche Milchkontor* without providing justification in this regard. It was mitigated in the so-called *ESF case*<sup>88</sup> and *Agroferm*<sup>89</sup> in which the Court of Justice departed from *Deutsche Milchkontor* on the basis of a different interpretation of recovery provisions in the respective regulations with the effect of excluding procedural autonomy. In *ESF case*, the Court of Justice concluded that Article 23 of the Regulation (EEC) No 4253/88 constituted a relevant legal basis for the recovery by national administrative authorities of sums unduly paid in the framework of the European structural funds without there being any need for authority under national law.<sup>90</sup> The fact that the EU was repaid by the Member State does not, as such, dispense the latter from the obligation to recover such amounts.<sup>91</sup> In *Agroferm*, the Court of Justice followed *ESF case* and held that the legal basis for the repayment of amounts wrongly paid by under Regulation No 1265/2001 was Article 8(1)(c) of Regulation No 1258/1999 on the financing of the common agricultural policy.<sup>92</sup> However, the wording of both recovery provisions stipulates clearly that the Member States shall take the necessary measures to recover any amounts lost as a result of an irregularity or negligence – i.e. that the recovery should be based on national rules. In *Deutsche Milchkontor*, the Court of Justice previously ruled that Article 8(1) did not constitute a legal basis for recovery, and the wording of the article has not been changed. In other words, the Court of Justice in *Agroferm* and *ESF case* changed the interpretation of recovery provisions from a literal to a purposive one. In *ESF case*, the Court of Justice referred to objectives and main principles underlying the management of the structural funds and the responsibility for control of financial resources. The opinion of AG Kokott in *Agroferm* shed more light on the reasoning behind these rulings. AG Kokott puts forward two main arguments for applying EU principles: uniform application of EU law and effectiveness of EU law, which coincides with the two ‘axes’ of Dougan justifying the CJEU’s intervention in the domestic systems. What

<sup>88</sup> Extensive comments on this judgment: J.M. Davidson, ‘The Full Effect of Community Law – An Increasing Encroachment upon National Law and Principles’ [2008/2] *REALaw* 113-126.

<sup>89</sup> This line of case law has been followed in Case C-599/13 *Somalische Vereniging Amsterdam en Omgeving (Somvao) v. Staatssecretaris van Veiligheid en Justitie*, not yet published, paragraph 50-52. With regard to the analysis of *Agroferm* see my analysis (in Polish) – M. Weisbrot, ‘Zasada ochrony uzasadnionych oczekiwań w sprawach o zwrot nienależnych subwencji – glosa do wyroku Trybunału Sprawiedliwości z 20.06.2013 r. w sprawie C-568/11 *Agroferm A/S Ministeriet for Fødevarer, Landbrug og Fiskeri*’ (‘Principle of the protection of legitimate expectations in cases concerning recovery of wrongly paid subsidies – commentary on Court of Justice judgment of 20 June 2013 in case C-568/11 *Agroferm A/S Ministeriet for Fødevarer, Landbrug og Fiskeri*’) [2015/09] *Europejski Przegląd Sądowy*.

<sup>90</sup> Joined Cases C-383/06 - C-385/06, paragraph 39. According to this legal provision in order to guarantee successful completion of operations carried out by public or private promoters, Member States shall take the necessary measures to recover any amounts lost as a result of an irregularity or negligence.

<sup>91</sup> Joined Cases C-383/06 - C-385/06, paragraph 58.

<sup>92</sup> Joined Cases C-383/06 - C-385/06, paragraph, 49.

is more interesting is that the AG Kokott interlinked the uniform application with the effectiveness of enforcement of EU law:

‘There is, moreover, no inconsistency between the Member States being bound by the principle in EU law of the protection of legitimate expectations and the settled case-law according to which a practice of a Member State which does not conform to EU law cannot give rise to a legitimate expectation in an individual who benefits from the resulting situation.’<sup>93</sup>

It is true that in the described line of jurisprudence the Court of Justice applied strict interpretation of EU principle of legitimate expectations.<sup>94</sup> However, the linkage between the argument of uniform application of EU law and the argument of effectiveness is a matter of interpretative choice rather than conceptual necessity. The uniform application of EU law does not necessitate effectiveness in recovery cases. Uniform application requires applying an unambiguous and identical set of conditions to legitimate expectations. Eventually, effectiveness requires restricted interpretation of these conditions. Therefore, it is rather a matter of practical consideration that compelled the Court of Justice to amend its case-law. Indeed, special reports of the Court of Auditors provide for some negative opinions of how the recovery of money was carried out.<sup>95</sup> It is clear from the reports of OLAF that EU-subsidies are subject to fraud, corruption and other illegal activities.<sup>96</sup> Moreover, the CJEU interprets the legislation governing CAP in teleological manner and allocates the risk of incorrect interpretation of the EU rules to the Member State.<sup>97</sup> In addition, according to M. Dougan in the so-called ‘sectorial model’, EU remedial competence, should, as far as possible, be selectively matched with the actual degree of EU substantive competence exercised over any given policy matter.<sup>98</sup> It is possible to argue that EU has developed its competences in CAP and structural funds to such degree and density that it justifies the uniformity of remedies and procedures to the

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<sup>93</sup> Opinion of AG Kokott in Case C-568/11 *Agroferm A/S v. Ministeriet for Fødevarer, Landbrug og Fiskeri* [2013] published in the electronic Reports of Cases (Court Reports – general), paragraph 50.

<sup>94</sup> Case 316/86 *Krücken*, paragraph 24: ‘A practice of a Member State which does not conform to EU rules may never give rise to a legitimate expectation on the part of a trader who has benefited from the situation thus created and the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of EU law; nor can the conduct of a national authority responsible for applying Community law, which acts in breach of that law, give rise to a legitimate expectation on the part of a of beneficial treatment contrary to EU law.’

<sup>95</sup> Court of Auditors, Special Report 22/2000 *On evaluation of the Reformed Clearance of Accounts Procedure* [2000] OJ C69/1, p. 13-23.

<sup>96</sup> OLAF Report 2013 p. 22 source: [ec.europa.eu/anti\\_fraud/documents/reports-olaf/2013/olaf\\_report\\_2013\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/reports-olaf/2013/olaf_report_2013_en.pdf)

<sup>97</sup> P. Craig 2012 *supra* 1, 87.

<sup>98</sup> M. Dougan 2004 *supra* 1, 67.

effect of applying EU principle of legitimate expectations in all recovery procedures and at the same time imposing a restricted interpretation of this principle.

### 3.3 Conditions and Limits of Legitimate Expectations

It should be noticed that when the Court of Justice has applied the Union's principle of legitimate expectations, it resulted in a restricted interpretation of this principle and dismissal of relevant pleas. These cases, as described above, like *Krücken* and *Agroferm*, seem to connect uniformity with the necessity to ensure the effectiveness of EU law. EU principles should apply in any case of recovery of EU subsidies and *a priori* they are precluded from applying *contra legem*. Any failure to comply with conditions to grant the subsidies leads to the invalidation of the right to rely on the principle of legitimate expectations. It is based on the principle that the application of national law may not hinder the application or the effectiveness of EU law. This approach is parallel to the restricted interpretation of legitimate expectations in state aid, which will be compared later in this article.

On the other hand, in cases in which the Court has enabled national principles, it allowed some degree of the protection of legitimate expectations despite irregularities in subsidies, provided that EU interests has been taken into account. This case-law has gradually developed some level of harmonisation through the imposition of requisite good faith. The Court of Justice has been more inclined to a dialogue with national courts and has left room for interpretation of how to apply its national principle of legitimate expectations in the EU context. This case-law sets out conditions and limits on the legitimate expectations. I will shortly describe them.

#### 3.3.1 Good Faith

Good faith should be regarded as the subjective state of the recipient, that is to say, lack of awareness of the undue nature of the benefit received. It implies that an individual has not contributed intentionally to the infringement of law, which excludes fraud, corruption or any other sort of criminal conduct.

Reliance on the expectations created by an initial awarding decision can only be successful if the person concerned acted in good faith. In *Martin Huber* the Court of Justice ruled that the application of legitimate expectations assumed that the good faith of the beneficiary of the aid in question is established.<sup>99</sup> With regard to *ESF case*, it is possible that one of the reasons to refuse legitimate

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<sup>99</sup> Case C-336/00 *Martin Huber*, paragraph 59. In fact, this occurred before in Case C-298/96 *Oelmühle*, paragraph 29; Case C-366/95 *Steff-Houlberg Export I/S*, paragraph 21.

expectations related to the Dutch Article 4:49 GALA which does not refer to good faith and creates a higher duty of care on the part of administrative authorities.<sup>100</sup>

### 3.3.2 Fault of a Third Party

Fault of a third party has been established in *Steff-Houlberg Export*<sup>101</sup> as a sufficient legal basis to rely on legitimate expectations by an exporter that exported products compliant with legal requirements. The case concerned a demand for repayment of export refunds. The reason for the undue payment pertained to serious fraud and punishable offences on the part of a third party (producer), as well as an excessively long period of proceedings and the negligence of domestic authorities in carrying out controls of the production.<sup>102</sup> Fault of the third party was taken into account because of the negligence of the national authority who failed to carry out the controls required by law. Under such circumstances, the beneficiary relied on legitimate belief that the product met the legal requirements to be eligible for export refunds and declared it accordingly to the authorities. However, this circumstance as it stands alone would not be sufficient. In general, even fraudulent behaviour by a third party does not amount to force majeure but constitutes an ordinary commercial risk.<sup>103</sup> Moreover, the fact that the beneficiary drafted declarations wrongly certifying the composition of products prevents the reliance on legitimate expectations as occurred in *Agroferm*.

### 3.3.3 'Wrong' Interpretation of Complex Legal Provisions

It is possibly the most complex legal circumstances which may trigger the application of legitimate expectations. In the framework of CAP and structural funds the recovery of unduly paid subsidies usually is caused by the non-compliance with conditions for the granting of the subsidy. It is clear that the Court rejects *contra legem* operation of legitimate expectations.<sup>104</sup> According to established case-law, legitimate expectations cannot be relied upon

<sup>100</sup> P. Boymans & M. Eliantonio 2013 *supra* 2.3., 726.

<sup>101</sup> Case C-366/95 *Steff-Houlberg Export I/S*.

<sup>102</sup> It is apparent from the order for reference that the various national authorities involved in the main proceedings did not tighten checks on Slagtergården even though irregularities had been detected in the latter's practices. The fact that certain checks carried out by the State authorities, inter alia in Denmark, were inadequate was, moreover, highlighted in the Court of Auditor's Special Report No2/90 of 5 April 1990 on the management and control of export refunds (*OJ* 1990 C 133, p. 1), as a result of which checks appear to have been made more stringent.

<sup>103</sup> See as well: Case C-347/93 *Belgian State v. Boterlux SPRL* [1993] ECR I-3933.

<sup>104</sup> J.E. van den Brink, W. den Ouden, S. Prechal, R.M.G.M. Widdershoven 2015 *supra* 1, 214-216.

against a precise provision of EU law.<sup>105</sup> Manifest illegality precludes legitimate expectations. However, *a fortiori*, legitimate expectations can be relied on in relation to complex legal provisions and legal frameworks. It should be noted that the uncertainty may be enhanced in the event of a preliminary ruling finding national administrative practice illegal with the *ex tunc* effect.<sup>106</sup>

In *Peter Biegi*,<sup>107</sup> which concerned Community Customs Code, the Court of Justice admitted that legitimate expectations were possible due to error of public authorities in the situation of complex legislative framework and the lapse of a long period of time. It is worth to mention as well *Elmeka*,<sup>108</sup> even though it concerns a VAT directive. In its ruling the Court of Justice did not prohibit referring to the wrongful information given by Greek authorities on the interpretation of an EU Directive that eventually proved to be erroneous. The Court of Justice did not rule whether it is essential that the authority was not entitled to provide binding opinions in this field.

However, these rulings are to be treated as exceptions to the principle that an established administrative practice at national level contrary to Union law cannot constitute sufficient basis for legitimate expectations. This would substantially hinder the enforcement of EU law, especially when subsidies are financed from the Union budget, as will be described in the next subparagraph.

### 3.3.4 Mistakes of National Authorities

Strict liability in recovery cases has been established in *Maizena*:

The practice of a Member State which does not conform to Community rules may never give rise to legal situations protected by Community law and this is so even where the Commission has failed to take the necessary action to ensure that the State in question correctly applies the Community rules.<sup>109</sup>

Another aspect as to why the Court of Justice is reluctant to admit the conduct of national authorities for establishing legitimate expectations was referred to in *Elmeka* by Advocate General Stix-Hackl:

<sup>105</sup> Sometimes the Court uses term 'unambiguous'; see Case 316/86 *Krücken*, paragraph 24.

<sup>106</sup> See for instance Case 210/87 *Remo Padovani*.

<sup>107</sup> Case C-499/03P *Peter Biegi Nahrungsmittel GmbH and Commonfood Handelsgesellschaft für Agrar-Produkte mbH v. Commission of the European Communities* [2005] I-01751.

<sup>108</sup> Joined Cases C-181/04 to C-183/04 *Elmeka*.

<sup>109</sup> Case 5/82 *Hauptzollamt Krefeld v. Maizena GmbH* [1982] ECR 4601, paragraph 22; see as well Case 188/82 *Thyssen AG v. Commission of the European Communities* [1983] ECR 3721 and in; in Case 316/86 *Krücken*, paragraph 23; Case C-201/08 *Plantanol GmbH & Co. KG v. Hauptzollamt Darmstadt* [2009] ECR I 8343 paragraph 53; Opinion of AG Kokott in Case C-568/11 *Agroferm*, paragraphs 43 to 50.

‘In this respect, it is also necessary to bear in mind the general interest situation in areas such as aid or export refunds or the Community’s own resources, where the Member States sometimes have no natural vested interest in the correct application of the Community rules concerned. In these circumstances, a strict interpretation of the principle of protection of legitimate expectations serves to prevent Member States from effectively frustrating the full application of Community law to the trader through their own unlawful conduct.’<sup>110</sup>

On the other hand, the Court of Justice had established in *Deutsche Milchkontor* that it was not contrary to EU law, in the recovery of unduly-paid sums, to take into account legitimate expectations where they were related to the administration's own conduct and it could therefore have prevented them from occurring.<sup>111</sup> The national court’s appraisal may thus also take into consideration the possibility that the national authorities were jointly responsible.<sup>112</sup>

Another example can be found in *Martin Huber* in which the annex to a grant a contract was allegedly not attached and a beneficiary was not aware of additional conditions for reimbursement. In fact, a copy of the annex was available only in Vienna at the Federal Ministry for Agriculture and Forestry. Given these circumstances, the irregularity was caused by lack of knowledge on specific conditions of which the beneficiary was not aware. In *Stichting ROM-projecten*, the Dutch authorities failed to convey the conditions of the grant laid down in that decision to ROM-projecten, and the beneficiary of EU financial assistance was not in a position to unequivocally ascertain what its rights and obligations were. The Court of Justice decided the principle of legal certainty and legitimate expectations precluded reliance on those conditions against that beneficiary.

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<sup>110</sup> Opinion of AG Stix-Hackl in Joined Cases C-181/04 to C-183/04 *Elmeke* paragraph 45. In paragraph 46 of the same opinion, AG added: ‘The situation with respect to the collection of value added tax, which is primarily in the interests of the Member States, should, it seems to me, be rather differently appraised. In this case, there is much less risk of a Member State preventing the full implementation of Community law in favour of the trader and at the expense of the Community through its own unlawful practices. In this context, the question of the legal protection of the trader from the administrative actions of the Member State in implementing Community law assumes greater importance and it seems reasonable that a trader should be able to rely on the Community principle of protection of legitimate expectations in his dealings with the authorities of the Member State.’

<sup>111</sup> Case 205/82 - 215/82 *Deutsche Milchkontor*, paragraph 31.

<sup>112</sup> Opinion of AG S. Alber in Case C-336/00 *Martin Huber*, paragraph 124.

### 3.3.5 Prudent and Diligent Trader Test

It should be noted that not every mistake of a public authority automatically is regarded and employed against the recovery. Reliance on legitimate expectations will fail if the person concerned should reasonably have discovered the irregularity. The Court of Justice requires individuals to display a considerable degree of diligence. As observed in many cases, the Court employs a test of a diligent trader that should not have relied on inaccurate information or a decision from a Union or national administrative authority.<sup>113</sup> The test of a prudent and diligent trader is embedded in the condition that the violation of clear legal provisions will prevent legitimate expectations as described above.

## 4 Legitimate Expectations in State Aid Recovery

The purpose of this part of the article is to compare the new case law in recovery in CAP and Structural Funds with state aid jurisprudence on recovery. The case-law on state aid recovery and legitimate expectations is enormous. However, for the purpose of this analysis, it is sufficient to focus on the question of to what extent it is possible to make a plea based on the breach of a national principle of legitimate expectations and to what extent the Court of Justice accepts the conduct of national competent authorities as a valid source of legitimate expectations in recovery cases.

### 4.1 Purpose and Object of Recovery

According to the Court of Justice, the purpose of recovery is to restore the situation existing prior to the granting of the illegal and incompatible state aid.<sup>114</sup> By repaying state aid, the recipient forfeits the advantage that it had enjoyed over its competitors on the market, and the situation prior to payment of the state aid is restored.<sup>115</sup> The removal of unlawful aids by means of recovery is the logical consequence of a finding that the aid is incompatible.<sup>116</sup>

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<sup>113</sup> E. van den Brink, W. den Ouden, S. Prechal, R.M.G.M. Widdershoven 2015, *supra* 1, 213; to that effect: Case C-365/89 *Cargill BV v. Produktschap voor Margarine, Vetten en Olien* [1991] I-03045, paragraphs 18-22; Case C-5/89 *Commission of the European Communities v. Federal Republic of Germany* [1990] I-03437, paragraph 14.

<sup>114</sup> Joined Cases C-278/92 and C-280/92 *Spain v. Commission* [1994] ECR I-4103, paragraph 75.

<sup>115</sup> Case C-350/93 *Commission v. Italy* [1995] ECR I-699, paragraph 22; see as well: E. Righini, 'Godot is here: recovery as an effective State aid remedy', in: G.C. Rodríguez Iglesias & K. Van Miert & M. Monti & N. Kroes (Eds), *EC State Aid Law – Liber amicorum Francisco Santaolalla Gadea* (Kluwer Law International 2008), 267-268.

<sup>116</sup> Case C-277/00 *Germany v. Commission* [2004] ECRI-3925 paragraph 74; Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle v. Commission* [2005] ECR II-1579 paragraph 112.

Recovery, therefore, is not intended to penalise the behaviour of a Member State or undertaking, but rather to ensure proper functioning of the internal market.<sup>117</sup> Therefore the main purpose of recovery is to eliminate the distortion of competition caused by the competitive advantage attributable to the unlawful aid.<sup>118</sup> It should be borne in mind in this respect that, under Article 14(3) of Regulation No 659/1999,<sup>119</sup> the application of national procedures is subject to the condition that those procedures allow the immediate and effective execution of the Commission's decision, a condition which reflects the requirements of the principle of effectiveness laid down previously by case law.<sup>120</sup> The 13<sup>th</sup> recital in the preamble to that regulation states that, in cases of unlawful aid which is not compatible with the common market, the effective competition should be restored and for this purpose it is necessary that the aid be recovered without delay. The application of national procedures should not therefore impede the restoration of effective competition by preventing the immediate and effective execution of the Commission's decision. To achieve this result, Member States should take all necessary measures ensuring the effectiveness of that decision.

According to Articles 11(2), 14(1) and 16 of Regulation No 659/1999, the Commission's power is restricted to unlawful aid and cases of misuse of power. Under certain conditions, it can cover existing aid as well.<sup>121</sup> In cases of unlawful aid, it will be in relation to a negative decision. According to Regulation 659/1999, 'unlawful aid' shall mean new aid put into effect in contravention of Article 108 TFEU (the so-called 'standstill obligation'), which provides that the Member State shall not put its proposed measures into effect until the procedure has resulted in a final decision. This prohibition has direct effect. In most of the cases, the recovery can only appear in case of existing state aid that has not been subject to the notification procedure under Article 108 TFEU. EU law regulates the recovery decision, however, the recovery procedure is in the absence of any EU rules, governed by relevant national law. The principle of immediate and effective implementation as defined in Article 14(3) of Regulation 659/1999 imposes important constraints on the national procedures and legislation governing recovery.

<sup>117</sup> E. Righini 2008 *supra* 4.1., 267-268.

<sup>118</sup> Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle*, paragraph 112. Compare as well: H.J. Priess: 'Recovery of illegal state aid: an overview of the recent development in the case law' [1996/33] *CML Rev.* 69.

<sup>119</sup> Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU], *OJ* 1999 L 83, p. 1.

<sup>120</sup> Case 94/87 *Commission v. Germany* [1989] ECR I 175, paragraph 12; Case C-24/95 *Land Rheinland-Pfalz v. Alcan Deutschland GmbH* [1997] ECR I 1591, paragraph 24.

<sup>121</sup> More on the subject: L. Hancher & T. Ottervanger & P.J. Slot, *EC State Aid* (London 2012) 668-669.

## 4.2 Legitimate Expectations in State Aid Recovery

At the outset in case law concerning the recovery of illegal state aid, the Court of Justice was facing the problem with the application of *Deutsche Milchkontor*, i.e. whether to allow national legitimate expectations in recovery of state aid. In case 94/97 *Commission v. Germany*,<sup>122</sup> the German government reasoned that protection of legitimate expectations under German law obliged the national authority to give the protection of the legitimate expectations of an undertaking that received aid greater weight rather than the public interest of the Community in having the aid recovered. The Court of Justice rejected this argument as the violation of the principle of effectiveness as defined in *Deutsche Milchkontor* and added that the EU's interest has to be fully taken into account. The procedural autonomy and national measures including legitimate expectations can be applied as long as the recovery of the aid is not rendered impossible in practice.

This case law however, was then taken further, in the *Alcan* cases.<sup>123</sup> The German government argued again that legitimate expectations of the undertaking which received the aid must prevail over the public interest of the EU in having the aid recovered.<sup>124</sup> In addition, German law prohibited the revocation of an administrative measure granting a benefit more than one year after the administrative authority became aware of the circumstances constituting grounds for revocation. The Court of Justice rejected these arguments. Regarding legitimate expectations, it acknowledged *Deutsche Milchkontor*, however refused any form of objection on the basis of legitimate expectation, without finding it necessary to stipulate whether it be the national or Union principle:

‘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 that article (now Article 108 TFUE). A diligent businessman should normally be able to determine whether that procedure has been followed.’<sup>125</sup>

In particular, where aid is paid without prior notification to the Commission, and thus unlawful under Article 108 TFUE, the recipient of the aid cannot have at that time legitimate expectation that its grant is lawful.<sup>126</sup> This means each

<sup>122</sup> L. Hancher & T. Ottervanger & P.J. Slot 2012 *supra* 4.1., 681.

<sup>123</sup> Case C-5/89 *Commission of the European Communities v. Federal Republic of Germany* [1990] ECR I-3437 and Case C-24/95 *Alcan Deutschland v. Commission* [1997] E.C.R. I-1591.

<sup>124</sup> L. Hancher & T. Ottervanger & P.J. Slot 2012, *supra* 4.1., 681.

<sup>125</sup> Case C-5/89, paragraphs 13 and 14 and Case C-169/95 *Spain v. Commission* [1997] ECR I-135, paragraph 51.

<sup>126</sup> Case C-24/95 *Alcan Deutschland GmbH*, paragraphs 30 and 31.

infringement of Article 108 TFUE would exclude legitimate expectations.<sup>127</sup> However, a recipient of illegally granted aid can rely on such expectation only in 'exceptional circumstances' on the basis of which it had legitimately assumed the aid to be lawful and thus can decline to refund that aid. The Court of Justice was clear that a Member State itself could not rely on the recipient's legitimate expectations, since it would in practice nullify the effectiveness of the Treaty in that Member State could rely on their own unlawful conduct to escape provisions of the Treaty.<sup>128</sup>

This case law has become the standard line of reasoning for pleas alleging the violation of legitimate expectations. The recovery constitutes in principle a foreseeable risk for a company benefiting from it.<sup>129</sup> The Court of Justice ruled that the fact that the recipients are small undertakings cannot justify legitimate expectations on their part as to the lawfulness of the aid.<sup>130</sup> Moreover, in the *CETM* case, it held that the fact that the loans were made by private banks, without involvement of the public authorities, cannot give rise to legitimate expectations and that the reductions in the interest rate were of state origin.<sup>131</sup> Therefore, applicants claiming the benefit of legitimate expectations in the context of state aid recovery proceedings are, by definition, in a difficult situation because they are in essence claiming the right from a measure vitiated *ab initio* by a procedural irregularity.<sup>132</sup>

As to whether the Court of Justice will take into account the conduct of national authorities as a valid basis for relying on the protection of legitimate expectations, the Court of Justice in *Alcan II* stated that the recipient of the state aid cannot claim it had legitimate expectation that the aid was lawful, based on the conduct of the State authorities, even if the latter were responsible for the illegality of the aid decision to such a degree that revocation appeared to be a breach of good faith.<sup>133</sup> It has been subsequently confirmed in case law that the behaviour of the Member State concerned is irrelevant.<sup>134</sup> The fact that the Member State concerned did not inform the aid beneficiary of the ongoing state aid investigation cannot be regarded as an 'exceptional circumstance' capable of giving rise to legitimate expectations that the aid was lawful. Likewise, incor-

<sup>127</sup> M. Heideheim, *European State Aid Law. A Handbook* (Munich 2010) 639.

<sup>128</sup> L. Hancher & T. Ottervanger & P.J. Slot 2012 *supra* 4.1., 682.

<sup>129</sup> Case C-148/04 *Unicredito Italiano SpA v. Agenzia delle Entrate, Ufficio Genova 1* [2005] I-11137 paragraph 109.

<sup>130</sup> Case C-298/00P *Italy v. Commission* [2004] E.C.R. I-4087 paragraphs 119-31.

<sup>131</sup> Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v. Commission of the European Communities* [2000] ECR II-3207 paragraphs 119-31.

<sup>132</sup> A. Giraud, 'A study of the notion of legitimate expectations in State aid recovery proceedings: "Abandon all hope, ye who enter here?"' (2008/45) *CML Rev.* 1405.

<sup>133</sup> Case C-24/95 *Land Rheinland-Pfalz v. Alcan Deutschland GmbH* [1997] I-01591 paragraph 41; see as well Commission Decision 2006/226/EC OJ 2006, L 81/36-42.

<sup>134</sup> Case T-109/01 *Fleuren Compost v. Commission* [2004] II-127 paragraph 143.

rect information provided by the Member State about the legality of the aid cannot under any circumstances give rise to legitimate expectations, especially where the Commission has not even been informed of that information.<sup>135</sup> However, a claim demonstrating that both the Commission and the Member State played a role in the creation of a legitimate expectation is acceptable.<sup>136</sup> Eventually, this reasoning precludes any form of 'national' interpretation of legitimate expectations to be binding. 'Exceptional circumstances' under which the Court of Justice may allow legitimate expectations will be assessed in the light of the EU principle of legitimate expectations. It would therefore appear that claimants seeking to establish the existence of 'exceptional circumstances' must be able to demonstrate that the Commission itself somehow contributed to their reasonable belief that the procedurally defective aids were nevertheless lawful.<sup>137</sup>

It is a well-known fact that a very limited number of successful pleadings based on the protection of legitimate expectations can be explained by the fact that the Commission has to assess *ex officio* the legitimate expectations in issuing decisions and any other general principles of law of the EU.<sup>138</sup> However, before the Court of Justice, it is still an exceptional situation to allow legitimate expectations. As observed, the doctrine of legitimate expectations in state aid that has been developed by the Court of Justice is limited to the 'exceptional circumstances'. It excludes any legitimate expectations with respect to the lawfulness of the national measure concerned. It may arise, however, with respect to the complexity pertaining to the definition of the state aid, which may bring about interpretative uncertainty concerning whether or not the Member State should notify the Commission. Some Advocate Generals have held that, especially with regard to the unusual form of state aid, that it would prevent diligent businessman from having legitimate doubts as to whether it constitutes state aid requiring notification.<sup>139</sup> This can be taken into account by the Commission, but not

<sup>135</sup> Case T-109/01 *Fleuren Compost*, paragraph 141-143.

<sup>136</sup> Commission Decision 2003/612/EC, *OJ* 2003, L 211/ 63-77 paragraph 68. See also Commission Decision 2003/611/EC *OJ* 2003, L 211/49-62.

<sup>137</sup> *M. Dougan* 2004 *supra* 1, 352.

<sup>138</sup> *A. Giraud* 2008 *supra* 4.2, 1427.

<sup>139</sup> Opinion of AG Darmon in Case C-5/89 *Commission v. Germany* [1990] ECR I-3437, paragraphs 24-26: 'I do not, therefore, consider it excessive to assume, in the absence of evidence to the contrary, that an undertaking which has not verified whether aid was notified is not entitled to rely on legitimate expectations. Traders in receipt of State aids are professionals who have a duty to take care – a duty to which Paragraph 48 of the German Law in question explicitly refers. The obligation under which they are placed to verify that prior notification of the aid granted to them has been given to the Commission does not appear to me to be either excessive or particularly difficult to fulfil. However, both the principle of the protection of legitimate expectations itself and the jurisdiction of the national courts to determine such matters must be preserved, and allowance must therefore be made for cases in which the fundamental rights of an undertaking, although it has not verified whether the aid had been notified, are such that it should none the less be accorded the benefit of the protection of legitimate expectations.' See as well opinion of AG Jacobs in Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v. La Poste and others* [1996] ECR I-3547 paragraph 73-76.

by the Court.<sup>140</sup> Another important interpretative uncertainty refers to differentiating new from existing aid<sup>141</sup> and in particular the concept of ‘the evolution of the common market’ as a condition for new aid under Article 1(b)(v) of Regulation 659/1999.<sup>142</sup>

## 5 Comparison of Recovery and Legitimate Expectations in State Aid with CAP and Structural Funds

The jurisprudence on legitimate expectations in the recovery of illegal state aid differs from the recovery of CAP and structural funds in many aspects.

Firstly, applicants claiming the benefit of legitimate expectations in the context of state aid recovery proceedings are, by definition, in a difficult situation because they are in essence claiming the right to benefit from a measure vitiated *ab initio* by a procedural irregularity which is not the case in recovery under CAP and Structural Funds. Moreover, the case law suggests that the Court of Justice’s motivation lies in the need to reinforce at the procedural level the highly centralized substantive framework which regulates state aid as well as to maintain undistorted competition between economic operators within EU.

Secondly, the Commission enjoys exclusive competences in the field of state aid. It excludes the national principle of legitimate expectations in relation to the conduct of legal acts of domestic authorities. The Court of Justice may allow the plea only in exceptional circumstances, which in turn occur in relation to the conduct of the Commission. Consequently, these exceptional circumstances will be assessed under the EU principle. In CAP and structural funds, the management is shared, with most of tasks assigned to the domestic authorities. In effect, it is sometimes exclusively the conduct of a domestic authority that can constitute a legitimate basis for entertaining expectations of beneficiaries.

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<sup>140</sup> Commission Decision 2006/621 OJ 2006 L 257/11. See more in this regard in A. Giraud, ‘A study of the notion of legitimate expectations in State aid recovery proceedings: ‘Abandon all hope, ye who enter here?’ (2008/45) *CML Rev.* 1410.

<sup>141</sup> Compare: W. Weiss & M. Haberkamm, ‘Legitimate expectations in State Aid and the CFI. Notes on the Judgments of September 9 2009 Concerning the Basque Tax Cases’ [2010/2] *European State Aid Law Quarterly* 532-534.

<sup>142</sup> R.M. Stein & A. Thomas, ‘Comments on Commission v Ireland and Others’ [2010/4] *European State Aid Law Quarterly* 841. These authors claim that: ‘The precedent case law provides that Article 1(b)(v) can cease to apply simply because the Commission changes its approach to adopt “more rigorous application of the Treaty rules and State aid” and that it is an underlying inconsistency of the State aid regime that the beneficiaries are now being penalised for Member States’s failure to notify the “new” aid to the Commission under Article 88(3), when even the Commission itself had not in the past felt there was a potential State aid issue’.

Thirdly, the main objective of state aid is to avoid distortion of the market. The competitive advantage given to national undertakings, which is a feature of state aid, does not necessarily exist in the context of EU aid under the common agricultural policy.<sup>143</sup> In *Oelmühle Hamburg*, the Court of Justice refused to apply state aid case law exactly on account of that difference:

‘The two situations are not comparable; in particular, the competitive advantage given to national undertakings, which is a feature of State aid, does not exist in the context of Community aid under the common agricultural policy.’<sup>144</sup>

Fourthly, there is a different profile of a beneficiary in CAP and Structural Funds than in the state aid (respectively farmers and large companies). Due to ‘subjective’ nature of legitimate expectations, the scope of protection can differ as to who is a beneficiary. One can argue that a farmer cannot be expected to fulfil his duty to obtain information independently in the same way as major economic undertakings under competition law. In competition law it is also relatively easy for undertakings to find out whether or not aid has been approved, since the payment of state aid requires a prior decision by the Commission.

To summarise these distinctive features of two regimes I will refer to AG Jacobs:

‘It seems to me that in the *Deutsche Milchkontor* judgment the Court properly left the matter to be decided in accordance with national law since there was no overriding Community interest justifying encroachment upon the procedural autonomy of the Member State concerned. By contrast, if a similar situation arose in relation to a State aid, it would jeopardize attainment of the aims of the Treaty provisions to allow the recipient to resist recovery because he had passed on the benefit of the aid to his customers by lowering his prices. In such circumstances he would with impunity receive a significant competitive advantage’.<sup>145</sup>

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<sup>143</sup> Opinion of AG Alber Case C-336/00 *Martin Huber* in paragraphs 113 and 114: ‘The interest in recovering aid where the conditions for granting it have been infringed must be weighed in each individual case against the protection of the defendant’s legitimate expectations and the principle of legal certainty. In doing so, the interests of the Community must be taken fully into consideration. That does not mean, however, that the Community interest in recovery should take precedence over the protection of legitimate interests in every case. Account must be taken of the fact that the granting of Community aid does not usually entail a distortion of competition, as is the case with the granting of State aid within the meaning of Article 92 of the Treaty.’

<sup>144</sup> Case C-298/96 *Oelmühle*, paragraph 37.

<sup>145</sup> Opinion of AG Mr. Jacobs in case C-24/95 *Alcan Deutschland GmbH*, paragraph 40. See as well opinion of AG Mr. Léger in Case C-298/96 *Oelmühle*, paragraphs 49-51.

Tridimas argues that the deference, as observed in *Deutsche Milchkontor*, to the national legal systems is measured and selective. It is measured because it places particular importance on the EU interest. It is selective because it does not apply to all areas.<sup>146</sup> *Deutsche Milchkontor* guaranteed a proper ‘dialogical’ approach. At the moment, this paradigm of ‘selectivity’ may cease to exist. It depends on whether the case-law on the basis of *ESF Case* and *Agroferm* will evolve in the direction as set out in the case-law in state aid, notwithstanding differences in these different EU sectors as characterized above.

## Conclusions

The analysis of legitimate expectations in recovery of unduly paid EU subsidies pertains to the very basis of the functioning of general principles of law in EU law and their impact on the judicial coherence of public law.

At the level of the imperative of consistency understood as *sine qua non* for any legal coherence, it has been observed that the inconsistencies in case-law whether or not to apply EU or national principles in CAP and structural funds seems now ceased to exist. It seems as well that EU principles prevail over its national equivalents. It is indeed a shift in the paradigm of reasoning in CJEU since *Deutsche Milchkontor*. The outcome on the administrative law and judicial coherence cannot be underestimated. There are numerous recovery procedures across the EU, within which the national authorities and national courts will have to apply the EU principle of legitimate expectations notwithstanding the fact that some of Member States do not recognize this principle and some of Member States have their own principle which differs from the EU one. Moreover, each national system sets out its own rules and principles on how to resolve the conflict between legal certainty and legality in case of illegal subsidies, including rules on the revocation of illegal administrative acts.

Judicial coherence requires the setting out the effective and fair methods for how the interrelations between the national and EU judges and courts should occur. As outlined above, the dialogical approach may need to be re-assessed in the light of the imperative of effectiveness of EU law in the recovery process. Moreover, in CAP and structural funds legitimate expectations may lose its practical meaning if the conduct of Member State would not be able to establish valid basis for legitimate expectations.

The encroachment on the very backbone of administrative law systems of the Member States can be however justified on the basis of the need to ensure the uniform application of EU law. It as well ensures the equal treatment of beneficiaries across the Union. Legitimate expectations enhance the rule of

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<sup>146</sup> T. Tridimas 2007, *supra* 1, 290.

law, legal certainty and it makes sense for justice in the EU legal system. On the other hand, the application of the EU legitimate expectations should not have the effect of excluding the practical meaning of this principle. As described above, the function of legitimate expectations aims at counterbalancing unacceptable outcomes of formalistic application of law that would endanger the value of trust towards Union law and its agents, irrespective of whether it is an EU or a national body. In that regard, it is important that this principle should be taken into consideration when irregularity in subsidies are being caused by national bodies, and national courts should not be precluded *ad hoc* from striking a proper balance between *effet utile* of EU law and the protection of interests of beneficiaries.