# Can Answers to Parliamentary Questions Entail Legitimate Expectations when Commission Decisions Cannot?

Annotation on the judgment of the General Court of 15 November 2018 in Case T-207/10 *Deutsche Telekom AG v European Commission, supported by Ebro Foods SA, Banco Santander SA, Iberdrola Sa and Telefónica SA*

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## I. Introduction

Article 16(1) of Regulation 2015/1589[1] and its predecessor Article 14 of Regulation 659/1999[2] provide that where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary, at the same time providing that the Commission 'shall not require recovery of the aid if this is contrary to a general principle of Community law'. According to settled Case law, the principle of the protection of legitimate expectations is a general principle of EU law.[3] This principle is considered to be a consequence of the principle of legal certainty, which requires that Union legislation is known with certainty and that its application is foreseeable to individuals, in the sense that, in the event of a change to a provision, it protects the natural or legal persons' legally acquired positions.[4]

In this case[5] the General Court (GC) extensively considered the ambit of this principle of the protection of legitimate expectations and the relation between this principle and the rule that unlawful aid shall be recovered. This annotation will discuss to what extent the GC's findings fit in the Court of Justice's findings regarding the recovery of unlawful aid.

## II. Background

Following a complaint from Deutsche Telekom AG the European Commission, by decision of 10 October 2007,[6] initiated a formal investigation procedure with regard to the Spanish tax scheme inserted as Article 12 (5) in the Ley del Impuesto sobre Sociedades (Spanish corporate income tax law) in 2004 (the tax scheme).

This tax scheme involved the amortization of the goodwill resulting from the acquisition of a significant shareholding in a foreign target company. In essence, it provided that a company which is taxable in Spain may deduct from its taxable income the financial goodwill deriving from the acquisition of a shareholding of at least 5% of a foreign company, in equal yearly instalments, for up to 20 years following the acquisition.

By decision of 28 October 2009,[7] the Commission held that the tax scheme qualified as State aid and declared the scheme incompatible with the common market. Since the scheme was not notified prior to its coming into force, the scheme constituted unlaw-

DOI: 10.21552/estal/2020/1/9

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1 (OJ 2015 L 248) 9.

2 (OJ 1999 L 83) 1. In this case it was Regulation 659/1999 that was applicable.

3 See further on this subject for instance : K. Jaros/N. Ritter, Pleading Legitimate Expectations in the Procedure for the Recovery of State aid, EStAL 4/2004, 573-583 and Claudia Saavedra Pinto, The 'Narrow' Meaning of the Legitimate Expectations Principle in State aid Law Versus the Foreign Investor's Legitimate Expectations, EStAL 2/2016, 270-285

4 Case C-107/97 *Rombi and Arkopharma* [2000] ECLI:EU:C:2000:253 [66].

5 Case T-207/10 *Deutsche Telekom AG v European Commission, supported by Ebro Foods SA, Banco Santander SA, Iberdrola Sa and Telefónica SA* [2018] ECLI:EU:T:2018:786 (*DT*)

6 (OJ 2007 C 311) 21.

7 Commission Decision 2011/5/EC, on the depreciation of financial goodwill for the acquisition of shareholdings in foreign companies, C 45/07 (ex NN 51/07, ex CP 9/07) applied by Spain (OJ 2011 L 7) 48.

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ful aid as well.[8] The Commission considered that the scheme was selective in that it only favours certain groups of undertakings that carry out certain investments abroad and that this specific character is not justified by the nature of the scheme. This decision entailed a series of judgments of the (then) Court of First Instance[9] and Court of Justice[10] and, after the CoJ's judgments on appeal, the General Court, which gave judgments in these related cases on the same day as the judgement that is the object of this annotation.[11] Apparently, the parties involved appealed from the latter judgments to the CoJ again.[12]

The important point of the Commission's decision from the perspective of the GC's judgment is that the Commission held that tax reductions enjoyed by beneficiaries in respect of intra-Community acquisitions which are related to an irrevocable obligation entered into before 21 December 2007 to hold such rights, can continue to apply for the entire amortization period established by the aid scheme.

In other words: for the aid that is granted under these circumstances the Commission ordered no recovery. The reason for this was that the Commission found that the beneficiaries of the scheme that fulfilled the conditions discussed above, could invoke the existence of legitimate expectations, caused by, as far as relevant in this case, by certain Commission's replies to written parliamentary questions.

On 19 January 2006 a Commissioner answered on behalf of the Commission in reply to the parliamentary question:

> The Commission cannot confirm whether the high bids by Spanish companies are due to Spain's tax legislation enabling undertakings to write off goodwill more quickly than their French or Italian counterparts. The Commission can confirm, however, that such national legislations do not fall within the scope of application of State aid rules, because they rather constitute general depreciation rules applicable to all undertakings in Spain.[13]

On 17 February 2006 a Commissioner answered, in reply to a second parliamentary question, again on behalf of the Commission:

> According to the information currently in its possession, it would however appear to the Commission that the Spanish (tax) rules related to the write off of 'goodwill' are applicable to all undertakings in Spain independently from their sizes, sectors, legal forms or if they are privately or publicly owned because they constitute general depreciation rules. Therefore, they do not appear to fall within the scope of application of the State aid rules.[14]

According to the Commission, by these replies it provided specific, unconditional and consistent assurances of a nature such that the beneficiaries of the measure at issue entertained justified hopes that the goodwill amortisation scheme was lawful, in the sense that it did not fall within the scope of State aid rules, and that any advantages derived from it could not, therefore, be subject to subsequent recovery proceedings. Although these declarations did not amount to a formal Commission decision establishing that the amortisation scheme did not constitute State aid, their effect was equivalent from the point of view of the creation of a legitimate expectation, especially in view of the fact that the applicable procedures ensuring the respect of the collegiality principle had been followed in this case, the Commission held.

## III. Judgment of the Court

In its appeal against the Commission decision Deutsche Telekom (DT) put forward one plea in law, arguing that the Commission was wrong to apply the principle of legitimate expectations to the benefit of certain beneficiaries of the contested scheme. According to DT the Commission should have ordered the recovery of the aid granted under the scheme and should not have allowed its implementation to con-

8 Commission Decision 2011/5/EC, para 158.

9 Case T-219/10, EU:T:2014:939. Related to this case is Case T-399/11, EU:T:2014:938 regarding Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign non-EU shareholding acquisitions.

10 Joined Cases C-20/15P and C-21/15P, EU:C:2016:981.

11 Case T-399/11 RENV, ECLI:EU:T:2018:787 and Case T-219/10 RENV, ECLI:EU:T:2018:784.

12 Case C-53/19 P *Banco Santander and Santusa Holding* and C-51/19 P *World Duty Free*.

13 Written Question E-4431/05.

14 Written Question E-4772/05.

tinue for acquisitions prior to the publication of the decision to initiate the formal investigation procedure.

As regards the relation between the duty to recover unlawful aid and the general principle of legitimate expectations, the GC started with referring to prior case law, holding that in view of the fundamental role that the obligation to notify aid measures has for the effectiveness of State aid control, the recipients of aid may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure provided for in Article 108 TFEU and a diligent business operator must normally be in a position to confirm that that procedure has been followed. In particular, if aid has been granted without prior notification to the Commission, so that it is unlawful under Article 108 (3) TFEU, the beneficiary of the aid cannot have legitimate expectations as to the lawfulness of the aid at that time, unless in exceptional circumstances.[15]

The GC observes that if legitimate expectations could not be invoked by beneficiaries for the sole reason that the aid was not notified, Article 14 of Regulation 659/1999, would be deprived of any significance, since it was precisely the legislator's intention to limit the scope of the obligation to recover *unlawful* aid declared incompatible by the Commission with the internal market.[16] After all, the obligation to recover aid that the principle of legitimate expectations aims to moderate is only to apply to non-notified aid that has been implemented without the Commission's approval.[17]

The GC considered that according to settled case law, the right to invoke legitimate expectations requires that three conditions are met. First, the person concerned must have received precise, unconditional and consistent assurances from the administration. Secondly, these assurances must be able to raise legitimate expectations for those to whom they are addressed. Third, the assurances must comply with the applicable rules.

DT did not dispute that the third condition was met. It disputed, however, that an additional condition - that the granting of the protection of legitimate expectations does not run counter to an overriding public interest - was satisfied.

Therefore, the GC examined whether the Commission correctly assessed the three conditions for the recognition of legitimate expectations contested by DT and, if so, whether it correctly defined the scope ratione temporis of recognized legitimate expectations. In this annotation I will focus on the way in which the Court dealt with the first two conditions and on what the Court considered about the scope ratione temporis of recognized legitimate expectations

## 1. Precise Assurances Contained in the Commission's Replies to Two Parliamentary Questions

As regards the first condition the GC held that the Commission's answers to parliamentary questions in January and February 2006 provided precise assurances to the beneficiaries of the contested scheme that the scheme was not covered by the State aid rules and that it was concerned for general depreciation rules for all companies in Spain.[18]

The GC observed, first, that the question clearly stated the legislation at issue, by mentioning 'Spanish legislation [enabling] companies to write down goodwill', while, secondly, the Commission gave a precise answer by clearly referring to the legislation referred to in that question, which it also contrasted with other Spanish tax legislation, and by stating clearly and unambiguously that the scheme at issue did not constitute State aid ('The Commission can confirm that such national legislation is not covered by State aid rules').

The Commission's second answer was expressed more cautiously than the first one. The GC considered, however, that that caution was without prejudice to the precise, unconditional and consistent nature of the Commission's position on the legislation at issue. According to the GC that caution could mainly be explained by the fact that the question raised solely concerned the legislation at issue and was intended to make the Commission give account for its inaction and its compliance with its obligations under (then) Regulation No 659/1999. The GC followed the Commission in its reasoning that this explains

15 See, *inter alia*, Case T-50/06 RENV II and T-69/06 RENV II *Ireland and Aughinish Alumina v Commission* [2016] EU:T:2016:227, [214].

16 *DT* [44].

17 *DT* [44].

18 *DT* [68].

why the Commission made clear that it would not carry out a thorough examination of the scheme at issue, in the case of information indicating that the scheme at issue would constitute State aid, but would do so with regard to the relevant information as it is required to do so under Article 10 (1) of Regulation 659/1999.

The GC furthermore pointed out that the term 'appears' must, moreover, be placed in perspective with the fact that, first, the Commission took a reasoned opinion ['it would ... appear to the Commission that the write off of goodwill is applicable to all companies in Spain independently from their sizes, sectors, legal forms or if they are privately or publicly owned because they constitute general depreciation rules'], and, secondly, it clearly contrasted this view with the absence of a position on the aspect discussed in the previous sentence ('the Commission cannot confirm whether ... it would however appear'). In addition the GC put this second answer in the context of the first answer from less than a month before, which was given by the same Member of the Commission and which was along the same lines, in that it used some of the same terms ('constitute general depreciation rules') which, according to the GC, demonstrates the consistent nature of the information provided.

With regard to DT's argument that assurances should be addressed to the party that invokes legitimate expectations, while the Commission's answers were not since they were addressed to the European Parliament, the GC considered that it does not appear from case law that the person concerned must be the formal addressee of the act which is the source of the precise assurances, but that the expression of the 'provided' or 'addressed' assurances implies that the person concerned must have been affected and informed by the assurances given. The GC added that the purpose of the parliamentary questions procedure is to inform the representatives of citizens in Parliament about the position from the institution being asked on issues that concern citizens, to allow them to determine their action accordingly. Furthermore, the Commission's replies were made public. Therefore, the GC held that the nature and manner of publication of the Commission's replies did not exclude as such the granting of specific assurances to the beneficiaries of the contested scheme.

## 2. Legitimate Nature of the Expectations Created

As regards the second condition the GC concluded that the Commission was entitled to consider that the expectations of the beneficiaries of the contested scheme were legitimate.[19] According to the GC a cautious and thoughtful economic operator could have had doubts about the legality of the scheme all the less since the Court itself ruled in 2014 that the Commission had not shown that the scheme, which was accessible to all undertakings without distinction, constituted State aid.[20]

The GC further assessed the nature of the act of the Commission and compared it with acts in other fields of EU Law and considered that expectations are only protected if the person concerned could reasonably be expected to rely on the maintenance or stability of the situation created by that act. According to the GC no legal situation has been created which could frequently be changed in the context of the Commission's discretion to assess that a particular measure does not constitute State aid, given the objective nature of the concept of State aid, unlike in an area such as the common market organisation, which is subject to constant adjustment with a view to changes in the economic situation and, therefore, prevents market participants from being protected in their expectations that the existing situation will be maintained.

As regards DT's complaint the GC replied that providing information on an alleged unlawful aid measure only leads to the obligation to examine this information as quickly as possible and to inform the complainant of the action taken on his complaint (Article 20(2) of Regulation 659/1999) but does not mean that the formal investigation procedure is initiated and, a fortiori, does not mean that a 'negative decision' will be issued stating that the aid is incompatible with the internal market. The GC pointed out that only one complaint was lodged with the Commission against the disputed scheme, whereas the disputed scheme had already been in force for several years at the time the complaint was lodged.

19 *DT* [80].

20 Case T-399/11 *Banco Santander and Santusa* [2014] ECLI:EU:T:2014:938, and case T-219/10 *Autogrill España* [2014] ECLI:T:2014:939, set aside by the judgment in Cases C-20/15P and C-21/15P *World Duty Free Group SA* [2014] ECLI:EU:C:2016:981.

Next, the GC rejected DT's argument that the Commission adopted decisions in 2000 and in 2006 declaring similar tax regimes incompatible with the internal market, which, according to DT, would stand in the way of legitimate expectations. The GC noted that the individual nature of the assessment of each notified or alleged aid precludes the assessment of a particular aid measure from questioning the legality of confidence in the assessment of a similar but different aid measure.

As for requests for information, sent to the Spanish authorities before the Commission initiated the formal investigation procedure and that were mentioned in the press February and June 2007 (), (see also point 4 above), the GC held that these, at that time, did not imply a position of the Commission on the legality of the national legislation.[21]

## 3. Scope Ratione Temporis of the Protected Legitimate Expectation

Finally, the GC dealt with DT's argument that the Commission was wrong to extend the protection of legitimate expectations to all acquisitions prior to 21 December 2007 (the date of publication of the decision to initiate the procedure in the Official Journal), including those which preceded the two Commission's 2006 replies and those dating back to the reply of 5 February 2007 to a parliamentary question.

Referring to its judgment in the case ESF Elbe-Stahlwerke Feralpi,[22] the GC considered that there may also be legitimate expectations for acts that precede the act that created the expectations. According to the GC, DT confuses, on the one hand, the date on which legitimate expectations were acquired, which corresponds to the date on which precise assurances were made with, on the other hand, the subject of the legitimate expectation obtained, which may extend to transactions carried out before that date, depending on the wording of the precise commitments.

The GC held that the Commission correctly considered that the legitimate expectations arising from its replies in 2006 related to the maintenance of the disputed scheme which entered into force in 2002 and thus covered the acquisitions made since then and the aid granted under that scheme, even if it was granted before the 2006 replies.[23] It considered that this assessment was not affected by the fact that the scheme at issue was not notified to the Commission, or by the fact that the scheme's beneficiaries were entitled to have legitimate expectations of its lawfulness only in exceptional circumstances. According to the judgment it follows from the existence of such circumstances that from the moment specific assurances are made of such a nature as to create legitimate expectations as to the lawfulness of the aid the beneficiary can no longer be considered to have been legitimately aware of the unlawfulness of the aid in question.[24] The GC continued with recalling that if it were otherwise, that would amount to ignoring the accuracy and reliability of the assurances given, in particular as regards the temporal scope of those assurances, and thus to remove one of the conditions for the recognition of legitimate expectations, while contributing in the case of aid not notified that the legitimate expectation of legality of such aid is recognized only in exceptional circumstances.[25]

The GC held that DT's argument would have the effect of compelling the beneficiaries of a tax measure to exercise particular diligence going beyond the obligations incumbent on an reasonably diligent economic operator and substantially equivalent to that of the addressee of the obligation to notify, while the classification as State aid of such a measure cannot be assumed and the absence of a notification obligation for beneficiaries is precisely one of the reasons for the possibility of grant them the benefit of legitimate expectation of the legality of a non-notified aid measure.[26]

DT's argument would also mean that the beneficiaries of the disputed scheme would be denied legitimate expectations for aid granted under that scheme for acquisitions which took place until February 2006 and then from November 2007. The GC recognised that apart from the complexity of the recovery obligation that would thus be imposed on the national authorities, such an approach would make the scope of trust dependent on coincidences related to acts giving rise to legitimate expectations and therefore creating legal uncertainty as to the application of the principle of legitimate expectations, which, accord-

21 *DT* [79].

22 Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* [2001] ECL:EU:T:2001:145).

23 *DT* [100].

24 *DT* [101].

25 *DT* [102].

26 *DT* [103].

ing to settled Case law, is regarded as the corollary of the principle of legal certainty.[27]

The GC concluded that the Commission did not err in finding that the legitimate expectations also applied to the aid granted on the basis of the contested scheme since its entry into force in 2002.[28]

### 4. Extension to Acquisitions Dating From After 5 February 2007

DT submitted that the legitimate expectations of the beneficiaries of the disputed scheme in the present case should have ended on 5 February 2007, the date of the Commission's reply to another parliamentary question.

Replying to this argument the GC stressed that a diligent economic operator can no longer have legitimate expectations as to the lawfulness of granted aid as from the publication of the decision to initiate the formal investigation procedure, since the opening of the formal investigation procedure means that the Commission has serious doubts as to the legality of the national measure in question from the point of view of EU law prohibiting State aid. It follows that, in order to put an end to duly created legitimate expectations, the Commission's statements in the reply of 5 February 2007 must at least give rise to serious doubts as to the legality of the contested provision.[29]

The GC didn't find that those doubts were apparent from the reply of 5 February 2007. Although the Commission referred in its reply essentially to the request for information sent to the Spanish authorities on 15 January 2007, such a request is only part of the preliminary phase of the examination of aid, the sole purpose of which is to enable the Commission to form an initial opinion on the national measure in question summary or vague manner, and merely reminds itself of its powers with regard to unlawful aid incompatible with the internal market.[30]

In conclusion the GC rejected DT's single plea.

## IV. Comments

While a favorable consideration of the position of beneficiaries of aid measures that were applied in good faith, with regard to their legal expectations may be applauded, especially when they benefited the companies involved for years, in the meanwhile the position of competitors of those beneficiaries should be considered with equal scrutiny. Whatever the role of the doctrine of legitimate expectations may be in the process of balancing these conflicting interests, at least this role should fit in the doctrine of lawful and unlawful aid and the obligations of reasonably diligent economic operators in relation to that issue. It is from that perspective that this judgment of the GC can be questioned. Before I come to that I will discuss some other remarkable points of the subject, the first one relating to the task of the Commission under Article 10 (1) of Regulation 659/1999. The GC followed the Commission that the Commission would not carry out a thorough examination of the scheme at issue, in the case of information indicating that the scheme would constitute State aid, but (solely) of the relevant information submitted, as it is required to do under Article 10(1). In my opinion, this distinction the GC makes between an examination of the scheme itself on the one hand, and an examination of the information (as mentioned in Article 10) on the other is rather subtle. Examining information indicating that a certain scheme may constitute aid, is hardly possible without examining the scheme involved. Shouldn't Article 10(1) automatically involve somehow an examination of the scheme to which the information refers?

A second striking point is the GC's observation that a cautious and thoughtful economic operator could have doubts about the legality of the scheme all the less since the Court itself ruled in 2014 that the Commission had not shown that the scheme constituted State aid.[31] I'll come back to the (non) retroactive effect of an event that could entail legitimate expectations, but for now I note that it is at least remarkable that the GC considers its judgment from 2014 – set aside indeed by the CoJ in 2016[32] - in any way relevant for the question whether the beneficia-

27 *DT* [104]

28 *DT* [106].

29 *DT* [110]

30 *DT* [111].

31 Case T-399/11 *Banco Santander and Santusa* [2014] ECLI:EU:T:2014:938, and case T-219/10, Autogrill España [2014] ECLI:EU:T:2014:939, set aside by the judgment in cases C-20/15P and C-21/15P *World Duty Free Group SA and Others* [2016] ECLI: EU:C:2016:981.

32 Case C-20/15P and C-21/15P, World Duty Free Group (n.31).

ries of the scheme could have legitimate expectations before 2007. It becomes all the more remarkable if the GC wants to suggest that since itself came to an incorrect judgment, *that* proofs that beneficiaries could think that the scheme did not qualify as State aid.

A further point that may be questioned is the GC's assessment of the nature of the replies of the Commission. As we saw, the GC compared these replies with acts of the Commission in other areas of EU Law and concluded that no legal situation had been created which could often be changed, given the objective nature of the concept of State aid, unlike in an area such as the common market organisation. In my opinion, it may be argued as well, however, that, precisely because of the objective nature of the concept of State aid – a concept that is not subject to the discretion of the European Commission – a cautious and thoughtful economic operator should have been aware that the existing 'situation' (that is the position of the European Commission) could change.

Another remarkable point is the GC's rejection of DT's argument that the Commission adopted decisions in 2000 and in 2006 declaring similar tax regimes incompatible with the internal market, considering that the individual nature of the assessment of each notified or alleged aid precludes the assessment of a particular aid measure from questioning the legality of confidence in the assessment of a similar but different aid measure. We saw that the GC held that a negative decision may invalidate the legitimate expectations created by precise assurances on the compatibility of similar national schemes. Although, this may be true as a rule, it is striking that the Commission itself in its decision of 2000 to which the GC referred,[33] considered that indeed, because of its earlier decisions on a similar however different tax measure of France,

> even the most cautious and well informed steel firms could not have foreseen the tax provisions under examination being classed as State aid contrary to Article 4 of the ECSC Treaty, and that they could rightly claim legitimate expectations.[34]

The most important questionable point is, however, as said above, how the GC's line of reasoning relates to the Court of Justice's finding in, for instance, CELF I,[35] that a positive decision of the Commission cannot be regarded as capable of having caused the recipient undertaking to entertain any legitimate expectation since that decision had been challenged in due time. What we see in that case is that a positive decision – a legal instrument that aims at producing binding legal effects, precisely worded, that, true, may be challenged before the Court – cannot entail such legitimate expectations, whereas, in this case, answers given to parliamentary questions, that are *not* a legal instrument (and cannot be challenged) and are less precise, followed by a request for information by the European Commission addressed to the Member State involved and followed by a complaint (of DT), can. I note that a third party (a competitor of the beneficiary, like, in this case, DT) is *not able* to lodge an appeal or any action whatsoever against an answer given by the Commission to a parliamentary question. But it doesn't seem very logical to consider the Commission's answers as capable to create exceptional circumstances just because there is no legal action available against those answers. Shouldn't, therefore, be relevant, if DT – or any other interested party – would have lodged a complaint within a month or so[36] after the answers given to the European Parliament, instead of after about 18 months?[37] I could imagine the relevance of such a fact: shouldn't there be no difference if an answer like the one given in this case would have been followed for instance within a period of one or a couple of months by a complaint and followed within a relatively short period by a request for information by the European Commission to the Member State involved? Clearly, from the judgment of the GC it appears that this wouldn't have been relevant for the GC, but it may be questioned why it didn't. I think it should have been relevant, in order to fit in the standard of assessment of legitimacy of expectations the CoJ applied in CELF I.

In this context one may wonder furthermore whether the GC applied a proper standard where it added that, even if the prudence which emerged from

33 Commission Decision of 31 October 2000 on Spain's corporation tax laws, 2001/168/ECSC, (OJ 2001, L60) [57].

34 ibid [25] and [28].

35 Case C-199/06, Centre d'exportation du livre français (CELF I) [2008] ECLI:EU:C:2008:79

36 Cf. the time limit (2 months) to lodge an appeal against a positive Commission decision, to which the CoJ refers in CELF I [66-68].

37 Cf. the delay in adopting a decision by the Commission in the RSV-case: Case 223/85, RSV [1987] ECR 4654 [12].

the Commission's second reply should lead to a closer examination of acts and behaviour of other parties (like the press, DT itself, the beneficiaries and the Spanish State), it cannot be inferred that the expectations were not justified because beneficiaries of the disputed scheme should have *foreseen* that the contested decision would be taken. Is it that a beneficiary must have *foreseen* that a negative decision would be taken in order to block the possibility of legitimate expectations being invoked, or should the standard be that the beneficiary could not have ruled out the possibility of a negative decision? I think it is the latter standard that fits in the line of reasoning of the CoJ that one may not invoke legitimate expectations in case of a positive decision against which an appeal is lodged. The CoJ did not mention (as a standard) that the beneficiary should have foreseen that the appeal would be honored.

As regards the scope *ratione temporis* of the protected legitimate expectation, we saw that the GC held that there may also be legitimate expectations for acts that precede the act that created the expectations. The GC pointed out that legitimate expectations usually concern the maintenance of an existing situation which, by definition, arose before the act that created the confidence in that enforcement. Although this may not be true in other situations, in which an individual acts on the basis of certain legitimate expectations and claims protection based on those expectations, in the field of State aid law, this would be the case. After all, the question about legitimate expectations rises after the aid has been given to the beneficiary. Like the GC says: the conduct that entails legitimate expectations does not have a retroactive effect in the sense that it results in legitimate expectations from the earlier events in question, but covers, from the date on which it occurs, prior events and their future effects. While this might seem logical from the perspective of the interpretation of Article 16 of Regulation 2015/1589, it raises the question, again, to what extent this approach is consistent with the doctrine the CoJ has developed in CELF I with regard to unlawful aid. In that case the CoJ considered that the undue advantage of an aid granted before the Commission declared that aid compatible, consists in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission's decision, and in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts. Therefore, the CoJ held that in the case of a positive decision (ie compatible but unlawful aid) a national court must order the aid recipient to pay interest in respect of the period of unlawfulness. The CoJ, however, even held that the national court, within the framework of its domestic law, may, also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it, subsequently.

It is clear that the GC in this case did not rule that the aid granted through the Spanish tax scheme wasn't unlawful aid. What, however, in my view, is hard to reconcile is the fact that in this case non-legal instruments like replies to parliamentary questions can stand in the way of the recovery of aid and, for that matter, even in the way of recovery of aid that was received before those replies, whereas on the other hand the CoJ stresses the obligation for undertakings to actively verify prior to the receipt of any aid, whether the aid is lawful or not and recovery of the advantage or even the aid as such should take place even after a positive decision.

## V. Final Remarks

From a legal protection's point of view of the beneficiaries of State aid, the General Court's judgment in this case may be applauded, since it doesn't leave empty-handed beneficiaries that acted upon a legal scheme that at the Commission's first sight didn't constitute State aid and, therefore, we may assume in good faith. It seems, however, that this judgment doesn't comply with the standards for honouring a claim of legitimate expectations as set by the Court of Justice and the Court's case law on the concept of compatible but unlawful aid.