

NEWSLETTER

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MADEIRA FREE ZONE – RECOVERY OF AID INCOMPATIBLE WITH EU LAW

The recovery of aid incompatible with EU law in the Madeira Free Zone (ZFM Scheme) remains a procedure fraught with significant legal uncertainties.

There has been a proliferation of national court decisions providing important clarifications regarding the application of taxpayer guarantees. The higher courts have been favourable to safeguarding the rights of beneficiary entities. However, several other cases still pending before the CJEU could have a significant impact on the harmonized legal application of the rules at stake.

Advisory Team



CONTEXT

As is widely known, the EU Commission's final decision regarding the aid scheme granted to companies in the Madeira Free Zone – ZFM Scheme – was published in 2022. In this decision, the EU Commission considered, for the reasons set out therein, that the scheme was being applied in breach of EU law on State aid, imposing on the Portuguese State the duty to recover the amounts unlawfully granted and the resulting interest.

The Portuguese State began notifying the beneficiary companies of the recovery of such aid, deemed to have been unlawfully granted – and to be reimbursed – a process which culminated in the notification of additional corporate income tax assessment notices.

The procedure for recovering State aid deemed to have been granted unlawfully, particularly where a tax scheme established by law is involved, is extremely burdensome for the entities and companies concerned, as there is no clear legal and procedural framework, given the coexistence of national tax legislation with EU rules and EU Commission guidelines, which are sometimes in conflict with national rules – which is why the Court of Justice of the European Union (CJEU) is frequently called upon, in preliminary rulings, to provide the necessary guidance on the application of the schemes in question.

In this regard, as tax enforcement proceedings have also been initiated to secure the actual payment of these debts by the beneficiary entities, judicial decisions have emerged from the Portuguese courts that are particularly noteworthy, regarding (i) the limitation period for these debts and (ii) taxpayers' guarantees in the context of tax enforcement proceedings, in particular the possibility of suspending enforcement proceedings upon the provision – or waiver – of a guarantee.

This newsletter will focus on the most recent significant developments in case law affecting the state aid recovery procedure, namely regarding taxpayers' guarantees, in particular the existence of a prior tax audit procedure, and the preliminary procedure for assessing state aid admissibility.

THE LIMITATION PERIOD FOR TAX DEBTS IN THE CONTEXT OF RECOVERY OF STATE AID DEEMED UNLAWFUL

In this regard, it is worth noting the recent judgment of the Southern Central Administrative Court, delivered on 16 October 2025 (Case No. 249/25.3BEFUN), in which the Court ruled on the applicability of the limitation period statute provided for in Council Regulation (EU) 2015/1589 of 13 July 2015, in the context of the recovery of State aid.

The Southern Central Administrative Court clarified that the ten-year limitation period provided for in the aforementioned EU Regulation applies only to relations between the European Commission and the Member States — and not to relations between the Portuguese State and the beneficiaries of aid deemed to have been unlawfully granted. As regards the latter, the Court ruled that the applicable limitation period must be governed by the rules of domestic law.

Accordingly, the Southern Central Administrative Court ruled that, in these cases of recovery of State aid in tax matters, the eight-year limitation period provided for in the national legislation is also applicable.

Thus, in the specific case of the judgment in question, as the debt relates to corporate income tax for the 2012 financial year, the Central Administrative Court ruled that the taxable event occurred on 31 December 2012; consequently, the limitation period, which began on 1 January 2013, would have expired on 31 December 2020, in the absence of valid grounds for suspension or interruption, given that the notices for the tax enforcement proceedings was only served in 2025.

Meanwhile, on 31 October 2025, an Order was also issued in Case No C-24/25 by the CJEU (Seventh Chamber). In this case, and notwithstanding the fact that the question referred for a preliminary ruling concerned the expiry of the right to tax, the CJEU held that the answer to the question referred was clearly derived from the case-law, thus deciding that the EU Commission could always request the recovery of unlawful aid within the ten-year limitation period provided for in Article 17(1) of Regulation 2015/1589, even if the limitation or expiry period provided for under national law had already expired.

Thus, at that point, it also became clear that, for the CJEU, in the context of this specific procedure, EU law precluded the application of a national limitation period to the recovery of aid where that period had expired even before the adoption of the EU Commission's decision declaring that aid unlawful and ordering its recovery.

It therefore remains to be seen how the situation will develop, particularly about the scenario where a limitation period expires after the European Commission has notified its decision ordering the recovery of unlawful State aid.

PROCEDURAL GUARANTEES FOR BENEFICIARIES OF STATE AID DEEMED TO HAVE BEEN UNLAWFULLY GRANTED

In the context of the initiation of tax enforcement proceedings aimed at recovering alleged tax debts arising from the State aid recovery procedure, the tax authorities have taken the

view that the domestic rules concerning the suspension of such proceedings, with or without the provision of guarantee, under national tax law, do not apply in this case.

The tax authorities maintain that the suspension of tax enforcement proceedings, as well as the possibility of payment by means of an instalment plan, conflict with an alleged imperative of immediate and effective recovery of State aid deemed to have been unlawfully granted.

This position was upheld by the Administrative and Tax Court of Funchal, which, in a first instance, ruled that the rules of domestic law, whether substantive or procedural, which may constitute an obstacle to the immediate recovery of State aid, must be set aside by virtue of the principle of the primacy of EU law over domestic law, and therefore the regime setting out the grounds for opposing enforcement must be set aside in situations, such as the present one, where a tax enforcement procedure is at issue for the recovery of State aid deemed unlawful, since such a regime prevents the effective and immediate recovery of that State aid.

The Supreme Administrative Court adopted a different position in its judgment of 3 July 2024, delivered in Case No. 088/24.9BEFUN. In this judgment, the Supreme Administrative Court ruled, in essence, that nothing prevented the application of procedural guarantees under domestic law in the context of the enforcement recovery of State aid deemed to be undue.

Consequently, following on naturally from opposition proceedings or judicial claims in the context of tax enforcement proceedings, there has been an intense debate regarding the applicability of the rules and guarantees of taxpayers provided for under domestic law.

Several cases are currently pending before the Supreme Administrative Court and the Administrative and Tax Court of Funchal, the disputes in which concern the same fundamental issue; a reference for a preliminary ruling has already been made to the CJEU, in the context of Case No. 299/24.7BEFUN, which is currently pending under Case No. C-545/24.

Thus, we must await the outcome of the proceedings currently before the CJEU, where the deviation from domestic procedural rules relating to procedural guarantees for beneficiaries of state aid deemed to have been unlawfully granted under the ZFM scheme.

It should be noted, that because of the suspension of judicial opposition proceedings, tax enforcement proceedings have also been suspended by the courts until the outcome of the Case No. C-545/24.

In view of the above, the Supreme Administrative Court decided to refer a new question for a preliminary ruling on the matter to the Court of Justice in order to better contextualise the doubt already raised and to request expedited proceedings (see the Judgment of the Supreme Administrative Court of 14 January 2026 in Case No. 0147/24.8BEFUN).

The Supreme Administrative Court bases the need to refer a new question on the content of the Advocate General's Opinion, delivered on 18 December 2025. The court considers that the context of the question under Portuguese constitutional law has not been adequately addressed. The new question raised therefore seeks to clarify whether – and to what extent – the principle of the legality of taxation, as it exists in the national legal system, influence the way the State fulfils its European obligation to recover aid deemed to be unlawful.

Also, on 19 December 2025, an arbitration decision was issued regarding the tax authorities' power to review ex officio the corporate income tax assessments of beneficiaries of aid deemed unlawful, without a prior tax audit procedure (see CAAD Judgment in Case No. 360/2025-T).

The court deemed the additional corporate income tax assessment unlawful as it did not result from a prior tax audit procedure, referring to the reasoning of the Supreme Administrative Court's judgment of 3 July 2024 in Case No. 088/24.9BEFUN, which supports the application of procedural guarantees under domestic law in the context of the enforcement recovery of State aid deemed to be undue, as mentioned above.

Thus, a tension arises between national and EU jurisdiction, requiring the Court of Justice to find a practical balance between the seemingly conflicting principles – the principle of legality of taxation, given that the national legislative body has absolute legislative prerogative over any alteration to taxpayers' guarantees, and the principle of EU law regarding the protection of the single market.

ON THE ADMISSIBILITY OF AID UNDER ZFM SCHEME

The EU Commission considers that ZFM Scheme, which it approved, aims to compensate undertakings carrying out their economic activities in Madeira for the additional costs arising from the region's structural disadvantages – remoteness, insularity, small size, difficult topography and climate, and economic dependence on a small number of products; and to contribute effectively to regional development, in particular through the creation and maintenance of jobs in Madeira.

It considers relevant for the calculation of the corporate income tax reduction only the profits resulting from activities directly affected by those additional costs and the jobs created and maintained in connection with those activities.

As an indicator of an effective contribution to regional development and, consequently, of the validity of the aid granted, the number of jobs created and maintained that contribute to the activities effectively and materially carried out in Madeira by the beneficiaries in each financial year should, in the EU Commission's view, be based on an objective and proven method used in the field of State aid.

Although ZFM scheme is a regional operating aid, EU Commission mentions in its final decision that the method it uses to calculate the amounts of regional investment aid is the number of jobs in annual labour units (ALUs) – the number of full-time workers over the course of a year, with part-time and seasonal work represented as fractions of ALUs; therefore, it considers the ALU method in the measures aimed at recovering the aid deemed unlawful by the Portuguese State.

The method covers all types of employment relationships and contracts (e.g. permanent or temporary work, employees and board members covered by various employment contracts with different companies, teleworkers).

Considering the above, the Portuguese tax authorities interpreted that the assessment of the admissibility of the aid granted is based on the number of jobs in ALUs for each beneficiary.

On 13 November 2025, the Court of Justice delivered its judgments in Cases C-9/24 P and C-13/24 P, both concerning appeals lodged by aid beneficiaries against the EU Commission's final decision on ZFM Scheme, dismissing the appeals.

In Case C-9/24 P, the Court of Justice dismissed the appeal, on the grounds that the EU Commission had not laid down any method for assessing the number of jobs, requiring only that it be objective and verifiable. It emphasises that it is for the national authorities to demonstrate that the method they apply makes it possible to determine the time spent by persons performing duties in companies registered in the ZFM in the context of activities affected by the additional costs resulting from their operation in the region.

Therefore, we can infer that the justification for additional corporate income tax assessments using the ALU method without a legal basis, on the grounds of an alleged imposition by the EU authorities, loses its meaning.

The Court of Justice’s judgment in Case C-13/24 P, in dismissing the appeal, states that companies wishing to benefit from aid may invest abroad, carry out international activities and conduct business or employ staff outside the region. However, profits generated by activities not effectively and materially carried out in Madeira should not be considered when calculating aid under ZFM Scheme because they result from activities not affected by the additional costs borne by those carried out in the region.

CONCLUSIONS

The current state of implementation and control of the Madeira Free Zone aid scheme (ZFM scheme) continues to give rise to significant legal uncertainties, both for beneficiary companies and for the Portuguese tax authorities themselves.

This is largely due to the coexistence of EU State aid rules with national tax law. The absence of an autonomous procedural framework for the enforcement and recovery of such State aid in tax matters places taxpayers in a situation of legal uncertainty, which is particularly exacerbated when this lack of clarity affects important rights and guarantees of taxpayers, such as the applicability of limitation rules, or the expiry of rights, and others, such as the possibility of suspending tax enforcement proceedings, with or without the requirement to provide guarantees, as well as access to instalment payment plans.

The aforementioned judgment of the Southern Central Administrative Court of 16 October 2025 is of relevance here in defining the scope of application of limitation periods in tax matters, clearly distinguishing between tax debts subject to the general eight-year period provided for in the national legislation and the duty to reimburse State aid.

We believe, however, that this matter will still be subject to specific consideration by the CJEU, which has, to date, clearly ruled on the inapplicability of the rules concerning the expiry of the right to tax where this occurs prior to notification of the EU Commission’s recovery decision.

For its part, however, the Supreme Administrative Court has reaffirmed that the primacy of EU law does not, in itself, preclude the application of national procedural rules on the taxpayer’s rights of defence and guarantees, and that a balance must be maintained between the effectiveness of recovery and effective judicial protection. However, the fact that several cases are pending before the CJEU (notably the aforementioned Case C-545/24) demonstrates that the legal framework for the recovery of State aid in a tax context continues to evolve.

Furthermore, the acknowledgement that there is no method for determining the number of jobs in each financial year when assessing the admissibility of aid granted – both at the

time of the EU Commission's final decision on ZFM scheme and in the decision itself – reinforces the position that corporate income tax assessments already made solely on the basis of that decision are null and void.

Future court decisions may come to (re)define the limits of national intervention, both as regards the applicability of limitation rules and the scope of taxpayers' guarantees.

Until definitive guidelines are established by the CJEU, the affected companies must naturally act with particular caution; it is essential to monitor the limitation periods and closely follow ongoing judicial and administrative proceedings, seeking to safeguard the rights of defence of the beneficiary entities, in this very specific context of the recovery of aids being claimed from them for having relied on national law and existing administrative practices.

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