Compatibility of (Belgian) Ruling Practice with EU State Aid Rules[1]

Compatibilidad (Belga) de la práctica de sentencias con las normas de ayudas de Estado de la UE

Compatibilidade (Belga) da prática de sentenças com as normas de ajudas de Estado da EU

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Abstract

The ruling practice of several Member States of the European Union (EU) currently is under mounting pressure as a result of the European fight against aggressive tax planning. At present, the compatibility of rulings is even questioned from an EU State aid perspective. According to the authors, this may be without reason.

In the present contribution it will be examined whether or not rulings can qualify as prohibited State aid. We will come to the conclusion that, in most cases, this is rather unlikely because even if a ruling could qualify as an 'advantage' (quod non), such advantage lacks the required 'selectivity'. Without a selective advantage, there is no State aid.

According to the authors, a ruling practice can be deemed incompatible with State aid regulations only in in one particular case, namely in case of a 'selecti-

1 This article is a (reworked) version of an earlier article published in Dutch in Algemeen Fiscaal Tijdschrift in October 2014 (J. Luts, 'Belgische rulings in het licht van de staatssteunregels').

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ve benefit granting ruling'. Because the ruling regime in Belgium does not allow for these types of rulings, at least the Belgian ruling practice appears to be EU compliant.

The current article focuses on the Belgian ruling practice in the context of EU State aid legislation. The conclusions reached herein, however, should to a large extent equally apply to similar systems of advance consultation (in tax matters) applicable in other jurisdictions across Europe (which are also subject to State aid rules) and the across the globe (which may be subject to GATT/WTO rules on subsidies). Where possible and useful, the authors will attempt to draw a parallel with the (Colombian) system of 'stabilization contracts'.

Key words

Ruling practice, Stabilization contract, State aid, Belgium, Europe

Resumen

La práctica de sentencias de varios Estados Miembro de la Unión Europea (UE) se encuentra, actualmente, bajo creciente presión como resultado de la lucha europea contra la planeación fiscal agresiva. En la actualidad, la compatibilidad de sentencias es incluso cuestionada desde la perspectiva de ayudas de Estado de la UE. Según los autores, esto puede no tener razón alguna.

En el presente trabajo, se examinará si las sentencias pueden ser calificadas como ayudas de estado prohibidas. Llegaremos a la conclusión de que, en la mayoría de los casos, esto es poco probable debido a que incluso si una sentencia pudiera ser calificada como una "ventaja" (quod non), tal ventaja carecería de la "selectividad" requerida. Sin una ventaja selectiva, no puede haber ayuda de Estado.

Según los autores, la práctica de sentencias puede ser considerada incompatible con las normas de ayudas de Estado únicamente en un caso concreto, específicamente en el caso de "sentencia de concesión selectiva de beneficios". Debido a que el régimen de sentencia en Bélgica no permite este tipo de fallos, al menos la práctica de sentencias Belga parece ser compatible con la UE.

El presente artículo se enfoca en la práctica de sentencias belga en el contexto de la legislación de ayudas de Estado de la UE. Las conclusiones aquí presentadas, sin embargo, deberían ser aplicadas en gran medida a sistemas similares de consulta avanzada (en materia fiscal) aplicable en otras jurisdicciones en toda Europa (las cuales también están sujetas a las normas de ayuda de Estado) y en todo el mundo (las cuales pueden estar sujetas a las normas sobre

subsidios GATT/WTO). Siempre que sea posible y útil, los autores intentarán trazar un paralelo con el sistema (colombiano) de "contratos de estabilización".

Palabras clave

Práctica de sentencias, Contrato de estabilización, Ayuda de Estado, Bélgica, Europa.

Resumo

A prática de sentenças de vários dos Estados Membro da União Europeia (UE) encontra-se atualmente sob crescente pressão como resultado da luta europeia contra o planejamento tributário agressivo. Na atualidade, a compatibilidade de sentenças é inclusive questionada desde a perspectiva de ajudas de Estado da UE. Segundo os autores, isto pode não ter razão alguma.

No presente trabalho, se examinará se as sentenças podem ser qualificadas como ajudas de estado proibidas. Chegaremos à conclusão de que, na maioria dos casos, isto é pouco provável devido a que inclusive se uma sentença pudesse ser qualificada como uma "vantagem" (quod non), tal vantagem careceria da "seletividade" requerida. Sem uma vantagem seletiva, não pode haver ajuda de Estado.

Segundo os autores, a prática de sentenças pode ser considerada incompatível com as normas de ajuda de Estado unicamente em um caso concreto, especificamente no caso de "sentença de concessão seletiva de benefícios". Devido a que o regime de sentença na Bélgica não permite este tipo de sentença, pelo menos a prática de sentenças belga parece ser compatível com a UE.

O presente artigo foca-se na prática de sentenças belga no contexto da legislação de ajudas de Estado da UE. As conclusões aqui apresentadas, no entanto, deveriam ser aplicadas em grande medida a sistemas similares de consulta avançada (em matéria tributária) aplicável em outras jurisdições em toda a Europa (as quais também estão sujeitas às normas de ajuda de Estado) e no mundo todo (as quais podem estar sujeitas às normas sobre subsídios GATT/WTO). Sempre que for possível e útil, os autores tentarão traçar um paralelo com o sistema (colombiano) de "contratos de estabilização".

Palavras-chave

Prática de sentenças, Contrato de estabilização, Ajuda de Estado, Bélgica, Europa.

Summary

Introduction

In several European jurisdictions, taxpayers have the possibility to apply for a '(tax) ruling' with their tax administration meaning a declaration furnished to the taxpayer by the authorities containing an interpretation and application of tax rules to a specific case. As from 2012, however, accusations appeared in the press of multinationals having received so-called 'sweetheart deals' in the form of a ruling.

This negative press coverage drew attention from the European Commission (Directorate-General for Competition) (the 'Commission'). Since June 2013 the Commission has been investigating the tax ruling practice of certain Member States. In December 2014, the Commission extended this information inquiry to all Member States.[3] These information requests took place against the background of the "global fight against 'aggressive tax planning' by multinational enterprises" that has been championed by the OECD in its –by now (in)famous– Base Erosion and Profit Shifting (BEPS) project.

In this respect, the statement of J. Almunia (then EU Commissioner for Competition) at the 2014 European Competition Forum of 11 Feb. 2014 is illustrative: "Aggressive tax planning is contrary to the principles of the Single Market, even under the present distribution of competences between the EU and its Member States. A limited number of companies actually manage to avoid paying their proper share of taxes by reaching out to certain countries and shifting their profits there. In those cases where national laws or tax-administration decisions permit or encourage these practices, there might be a State aid component involved and I intend to go to the bottom of it."[4]

On June 11, 2014, following-up on Commissioner Almunia's statement, the Commission announced that the next phase of the State aid investigation, i.e. a formal investigation procedure pursuant to Article 108(2) of the Treaty on the Functioning of the EU (TFEU), would be initiated as far as three specific cases (the rulings that had been received by Apple, Starbucks and Fiat in Ireland, the Nether-

3 Press Release, European Commission, Brussels, 17 Dec. (2014). IP/14/2742.
4 Speech Almunia SPEECH/14/119.

lands and Luxembourg respectively) were concerned.[5] On October 7, 2014, the Commission opened another in-depth investigation regarding Amazon in Luxembourg[6] after it had extended on October 1, 2014 an on-going investigation into the Gibraltar corporate tax regime, specifically to the tax rulings issued by Gibraltar.[7] Finally, in the beginning of February of 2015, the Commission also opened an in-depth investigation into the Belgian so-called 'excess profit' ruling regime.[8]

This situation shows that the question of compatibility of rulings with EU State aid rules is more relevant than ever. This is all the more so because a ruling being given the label of 'prohibited State aid' could be financially devastating for the taxpayer having obtained such ruling. Indeed, certain (non-notified) types of State aid can result in a mandatory recovery of the aid granted (including interest), subject to a limitation period of 10 years.[9] Moreover, taxpayers cannot, in principle, invoke the principle of legitimate expectations vis-à-vis their state of fiscal residence and/or the Commission when being confronted with such a recovery order.

In other words, the time is right to initiate this debate. This article should be seen as a catalyst for such debate and as a way to stimulate reflection on the topic. The authors will first discuss the main characteristics of the Belgian ruling system. Then they will give a status update on the EU State aid rules in a fiscal context. Subsequently, the Belgian ruling practice will be tested against the theoretical EU State aid framewor[10]. Possibly, the conclusion reached herein can be transposed onto other jurisdictions' rulings practice or similar systems of advan-

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5 Dec.Comm., 11 Jun. 2014, C(2014) 3606, Alleged aid to Apple (SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland); Dec.Comm., 11 Jun. 2014, C(2014) 3626, Alleged aid to Starbucks (SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – the Netherlands); Dec.Comm., 11 Jun. 2014, C(2014) 3627, Alleged aid to FFT (SA.38375 (2014/C) (ex 2014/NN) (ex 2014/CP) – Luxembourg).

6 Dec.Comm., 7 Oct. 2014, C(2014) 7156, Alleged aid to Amazon by way of a tax ruling (SA.38944 (2014/C)).

7 Press Release, European Commission, Brussels, 1 Oct. (2014). IP/14/01073.

8 Press Release, European Commission, Brussels, 3 Feb. (2015). IP/15/4080. In essence, excess profit rulings allow multinational entities in Belgium to reduce their corporate tax liability by excluding from the taxable base the 'excess profits', which are that portion of the profits of the company that (are deemed to) result from the advantages of being part of a multinational group (i.e. benefits arising through mere affiliation and *not* as a result of a concerted (group) action).

9 For sake of clarity: under EU State aid procedure rules (Article 108 of the Treaty on the Functioning of the European Union and Council Regulation (EC) 659/1999 of 22 Mar. 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, *OJ* 27.03.1999, L 83, 1), Member States should notify the Commission any (new) aid it is granting or is intending to grant ('notification obligation'). Furthermore, notified measures may not be put into effect until an approval is received from the Commission ('standstill obligation'). Aid that is granted without notification or notified aid that is granted before the Commission has made a final decision is considered 'unlawful aid'. When aid is considered as 'State aid' in the sense of Article 107 of the Treaty on the Functioning of the European Union (*infra*), it is considered as 'incompatible aid'. In principle, the Commission is *obliged* to order recovery of all unlawful and incompatible aid. A decision ordering recovery is directed at the EU Member State concerned, which is obliged to take all measures necessary to recover the total amount of aid from the recipients thereof.

10 We will only discuss the mechanism of rulings as such and not the compatibility with State aid rules of the underlying (interpreted and applied) legal provisions, nor will we discuss specific tax regimes that call for advance authorization through a ruling (*e.g.* tonnage tax regime or the Belgian excess profit ruling regime).

ced (binding) consultation of the (tax) administration, such as the more common methods of advance consultation (and concertation) in the Latin American world ('stabilization contracts')[11].

1. The concept of a 'ruling'

In Belgium, the concept of "rulings" was formally introduced with the Title II (Articles 20 to 28) of the Act of December 24, 2002[12] on a common system of advance tax rulings[13]. The ruling system allows every taxpayer to receive an 'advance decision' (*i.e.* the formal name of a ruling in Belgium) regarding its fiscal status.

An advance decision (hereinafter generally referred to as 'ruling') is legally defined as the legal act whereby the tax administration (The Federal Ministry of Finance) determines how the law is applied in a specific situation that has not yet produced any tax effects[14]. Rulings are issued by the Belgian Ruling Office ('BRO')[15], an entity which is part of the State Executive[16], and are published in anonymous form[17]. They are unilateral individual administrative acts[18] that only have binding force vis-à-vis the tax administration (meaning: not vis-à-vis the taxpayer or the courts and tribunals)[19].

The concept of an 'advance decision' or 'ruling' indicates that this instrument is not a tax 'understanding' or 'agreement' with the tax administration. The taxpayer has committed to nothing by applying for a ruling. Therefore, he is, in principle, neither obliged to (i) actually perform the operation that is described in the ruling nor (ii) to inquire into the correct interpretation of a tax provision prior to performing an envisaged transaction[20].

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11 Obviously, this is only feasible to the extent that these methods c.q. regimes are substantially similar to the Belgian tax ruling regime. Moreover, evidently, Latin American countries are not subject to EU State Aid rules but *may* in general be subject to WTO/GATT law on subsidies, which we will not further discuss. See also C. Micheau, *State aid, subsidy and tax incentives under EU and WTO law*, Alphen aan den Rijn, Kluwer Law International, 616 p. (2014).

12 Act of 24 December 2002 amending the corporate income tax regime by creating a system of advance rulings in tax matters, *Belgian Official Gazette* 31 December 2002 (in force as from 1 January 2003).

13 For a detailed analysis on (Belgian) rulings, see a.o. E. Van De velde, *'Afspraken' met de fiscus: de grenzen, juridische kwalificatie en rechtsgevolgen*, Gent, Larcier, 612 p. (2009).

14 Art. 20(2) Act 24 December 2002.

15 The BRO is a part of the Ministry of Finance, but acts autonomously (Art. 20 Act 24 December 2002).

16 Art. 23(2) Act 24 December 2002.

17 Art. 24 Act 24 December 2002.

18 E. Warson, *Invulling en precedentswaarde van rulings*, Gent, Larcier, 2011, 11.

19 Art. 23(2) Act 24 December 2002. According to the preparatory works, rulings are 'unilateral commitments that are conditional' made by the Ministry of Finance that are binding only upon the Ministry of Finance (See *Parl.St.* Kamer 2001-02, nr. 1918/001, 56-57).

20 See also T. Afschrift, "Le respect du principe de la légalité de l'impôt par le service des décisions anticipées", *RGCF* 2008, 443-444. This is different for tax provisions that, when the given conditions are met, do not directly allow the taxpayer to claim the benefits thereof but require that taxpayer to first request a tax 'authorization' from the competent tax authorities.

1. The *ratio legis* of the Belgian ruling system was to reinforce legal certainty and to improve the predictability of the tax consequences of an envisaged transaction[21], by granting the taxpayer the power to apply for a ruling (*cfr. infra*), which will allow him to anticipate the position of the tax administration on such transaction[22]. Moreover, by introducing this general and centralized framework it is possible to treat ruling requests in a uniform manner, thus minimizing the chances of discretionary decision-making[23].

2. The scope of application of the Belgian ruling framework is very broad[24]. *Ratione personae* the authors are not aware of any limitations, meaning every taxpayer can apply for a ruling[25]. *Ratione materiae*, the BRO can issue a ruling on the entire spectrum of material tax law[26],[27] In certain cases, however, a ruling cannot be issued. A good example is the case in which essential elements of the transaction or situation relate to a tax haven that does not cooperate with the OECD, or when the transaction described in the ruling lacks economic substance in Belgium[28].

Evidently, a ruling must be issued "in accordance with the legislation in force"[29] and "cannot result in an exemption from or reduction of taxes"[30]. This is in our opinion an (unnecessary) legal reference to the fact that the BRO is part of the State Executive and must respect the principles of legality[31] and equality[32],[33]. In our opinion, this also explains why the BRO cannot issue a ruling on tax rates or the calculation of taxes, etc.[34]. Finally, a ruling loses binding effect vis-à-vis the Mi-

21 *Parl.St.* Kamer 2001-02, nr. 1918/001, 9.
22 T. Afschrift, "Le respect du principe de la légalité de l'impôt par le service des décisions anticipées", *RGCF, 443, (2008).*
23 *Parl.St.* Kamer 2001-02, nr. 1918/001, 12 and 16.
24 *Parl.St.* Kamer 2001-02, nr. 1918/001, 15.
25 See E. Van De Velde, *'Afspraken' met de fiscus: de grenzen, juridische kwalificatie en rechtsgevolgen*, Gent, Larcier, 61. (2009).
26 See art. 20(1) Act 24 December 2002 and T. Afschrift, "Le respect du principe de la légalité de l'impôt par le service des décisions anticipées", *RGCF, 443. (2008).*
27 This includes double tax treaties and EU-law. See T. Vanwelckenhuyzen, "Les décisions anticipées en matière fiscale risquent-elles de créer une discrimination entre les contribuables?", *DAOR* 2005, 187 and 188.
28 Art. 22(2) Act 24 December 2002.
29 Art. 20(2) Act 24 December 2002.
30 Art. 20(3) Act 24 December 2002.
31 Art. 170 Constitution.
32 Art. 172 Constitution.
33 H. Verstraete and M. Isenbaert, "Kritische bespreking van het rulingbeleid: capita selecta", *Themis 2008-2009*, 34; B. Peeters, "Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?" in B. PEETERS and J. Velaers (eds.), *De Grondwet in groothoekperspectief. Liber amicorum discipulorumque Karel Rimanque*, Antwerpen, Intersentia, 2007, 557; See also E. Van De Velde, *'Afspraken' met de fiscus: de grenzen, juridische kwalificatie en rechtsgevolgen*, Gent, Larcier, 62, (2009).
34 Art. 22(1)(2°) Act 24 December 2002 *juncto* art. 1 of its implementing Royal Decree of 17 January 2003, *Belgian Official Gazette* 31 January 2003.

nistry of Finance (*ex tunc*) if its content does not correspond to reality[35] or "is not [or not anymore][36] in concordance with treaty law, EU law or national legislation"[37].

3. For the purposes of this contribution, we have defined a 'stabilization contract' as a contract concluded by a government agency with investors to prevent (adverse) changes to certain legal standards listed in the contract and governing the investment, in exchange for a stability premium and the accomplishment of the investment and certain other objectives (e.g. job creation).

When looking at this definition, we can establish two *material* differences with the concept of a Belgian ruling. Firstly, a 'stabilization contracts' is, as the name indicates, a mutual agreement between the government and the taxpayer/investor in which each party to the contract undertakes certain commitments for the agreement to remain valid, whereas a (Belgian) tax ruling is a unilateral commitment of the tax administration. Taking into account the analysis below, this difference as such does not seem decisive when determining the compatibility of rulings with State aid rules. This observation is supported by the fact that unilaterality is not a main, distinctive characteristic of rulings within the EU[38]. Secondly, the aim of a stabilization contract is the same as that of a ruling, namely, to create legal certainty for a given taxpayer. However, in the case of a stabilization contract, that goal is achieved differently than in case of a ruling. Whereas in case of a ruling the tax administration (unilaterally) commits itself that a legal provision is/is not applicable to the specific case or transaction detailed in the ruling, a stabilization contract will result in the inapplicability of certain amendments to the legal framework that take place after the contract, either through an exemption or through compensation (or in a mixed form) to the investor to the benefit of whom the stabilization contract has been concluded. As such, a ruling does not protect the taxpayer from legislative change (to the contrary, as discussed above a ruling will become invalid if and to the extent that the legal provisions that are the subject matter of the ruling are amended) whereas the aim of a stabilization contract is exactly to mitigate the effects of such a legislative change for the investor. According to the authors, this differentiating factor between a ruling and a stabilization contract is important when analyzing the compatibility of these instruments with EU State aid rules. This will be discussed more in detail below.

35 Art. 23(2)(1°) and (2°) Act 24 December 2002.
36 Art. 23(2)(3°) Act 24 December 2002.
37 Art. 23(2)(4°) Act 24 December 2002.
38 Several European jurisdictions other than Belgium appear to define a ruling as a multilateral instrument rather than a unilateral commitment (*e.g.* the Netherlands). The reason why in Belgium a ruling is (still) narrowly defined as a unilateral commitment from the tax administration, is the prevailing importance of the principle of legality: taxation arises (or exemptions apply) solely on the basis of the Law and therefore cannot be the subject of agreements with a (individual) taxpayer.

2. The concept of 'State aid'

Are incompatible with EU law and therefore prohibited pursuant to Article 107(1) TFEU, "*[…]* any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.". It is settled case law from the Court of Justice of the European Union (ECJ) that a measure has to fulfil four conditions cumulatively in order to constitute State aid[39]:

1) the measure must confer an advantage on an undertaking;

2) the measure must be granted by the State and through State resources;

3) the measure must (threaten to) distort competition and affect intra-EU trade; and

4) the measure must benefit only certain undertakings or productions (*i.e. selectivity* is required).

4. The formal mechanism through which the State aid is conferred, is not decisive. Because 'State aid' is a formal legal concept, deemed present whenever the objective conditions thereto have been fulfilled[40], it has been long accepted that aid taking the form of an (advantageous) tax regime can very well qualify as State aid (so-called 'fiscal State aid')[41]. Moreover, it is generally accepted that fiscal State aid can result both from unsound legislation, *i.e.* tax measures adopted by the State's Legislature, and unsound administration, *i.e.* the application of tax provisions by the State Executive of otherwise sound tax legislation[42].

Despite the fact that rulings clearly potentially fall within the abovementioned second category of measures, it is, in the authors' opinion, not completely clear under which circumstances they will effectively amount to State aid. That question is the subject matter of the analysis below, in which it will be verified how (Belgian) rulings relate to the four abovementioned criteria of State aid.

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39 B. Terra and P. Wattel, *European Tax* Law, Deventer, Kluwer 2012, 244; K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 20-21. (2013).

40 ECJ 16 May 2000, case C-83/98, *Ladbroke Racing*, §25; ECJ 22 December 2008, case C-487/06*, British Aggregates*, §111; ECJ 21 June 2012, case C-452/10, *BNP Paribas*, §100; Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, § 3; K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 21. (2013)

41 K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 2013, 21; C. Quigley, *European State Aid Law and Policy (2nd Ed.)*, Oxford, Hart Publishing, 66-67. (2009)

42 Commission notice on the application of the State aid rules to measures relating to direct business taxation, *Official Journal C* 10 December 1998, 384, §10 (regarding the requirement of 'granting through State resources') and §12 (regarding 'selectivity'). See also F.A. Gunn, "Formeel onderzoek naar Nederlandse rulings", *NTFR* 2014, 1562 *et seq*.; F.A. Gunn, "Fiscale staatssteun: dansen op de vulkaan", *NTFR* 2011, 1350 *et seq*.; F.A. Gunn, "Europese consultatie over fiscale staatssteun", *NTFR* 2014, 5 *et seq*.

First, the scope of our analysis needs to be clearly defined. In this contribution. We will only verify the compatibility of Belgian rulings with *EU State aid* rules and not, e.g., with WTO / GATT rules on subsidies.[43] In addition, our analysis is based on the premise that the (underlying) tax legislation on which a ruling is requested does not infringe State aid rules.[44] Moreover, in the framework of this contribution we will not elaborate further on the third condition for a rule to be deemed State aid, namely the fact that trade should be negatively impacted, because analysis of EU case law shows that, in practice, little attention is generally paid to this criterion.[45]

Although this article focuses on Belgian rulings, where possible and useful, a parallel will be drawn with 'stabilization contracts'.

3. Belgian rulings in light of Article 107(1) TFEU

3.1. Current guidance of the European Commission

In a notice issued in 1998, the Commission clarified how the application of tax provisions by the State Executive can result in selectivity (fourth condition to avail of State aid)[46]. The underlying principles of this notice have been reiterated and clarified in a draft notice on the concept of State aid published by the Commission in 2014[47]. This will serve as a starting point for our analysis.

According to the Commission, as a basic rule, the individual application of a general measure (*i.e.* sound tax legislation) becomes selective where the State Executive avails of a discretionary power that is exercised in a manner that goes beyond the simple management of tax revenues by reference to objective crite-

43 For a comparison of EU State aid rules and WTO rules on tax incentives, see C. Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, Alphen aan den Rijn, Kluwer Law International, 616 p. (2014).

44 If this is not the case, it seems fair to state that any tax ruling granted with respect to such unsound legislation would also amount to State aid, *i.e.* the tax ruling cannot eliminate the State aid qualification. Whether or not legislation is 'sound' from the perspective of EU State, aid rules is largely dependent on whether the contested tax provision confers a 'selective advantage' upon its beneficiaries. Although the notion of 'selective advantage' (which is in fact an amalgamation of criterion 1 and 4) is an evolving one, a tax provision in principle entails an 'advantage' if the contested rule derogates from the general tax system within the Member State concerned. This advantage is furthermore 'selective' whenever it (*de iure* or *de facto*) only benefits a specific group of undertakings instead of all undertakings in a similar legal or factual situation.

45 The threshold for the proof of an effect on competition and trade is a relatively low one, see further K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 83. (2013).

46 Commission notice on the application of the State aid rules to measures relating to direct business taxation, *Official Journal C* 10 December 1998, 384, §21-22.

47 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §21.

ria[48]. Stated otherwise, a discretionary power on behalf of the tax authorities is regarded as suspicious from a State aid perspective.[49]

Through a reference to the *Kimberley Clark Sopalin* case, the Commission presumably is referring to cases of *genuine* discretionary powers, meaning that the State body has a very wide margin of discretion ('*degree of latitude*') when taking decisions having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the advantage and the conditions under which such advantage is granted[50]. The Commission acknowledges that in daily practice tax rules need to be interpreted, but stresses that such interpretation cannot imply a *discretionary* treatment of undertakings. According to the Commission, every decision by the Administration that departs from the general tax rules leads, in principle, to a presumption of State Aid and must be analyzed in detail[51],[52].

Specifically as far as rulings[53] are concerned, the Commission argues that "administrative rulings that merely contain an interpretation of the relevant tax provisions without deviating from the case law and administrative practice do not give rise to a presumption of aid". However, the opacity of the decisions taken by the authorities (*e.g.* the absence of publication of the relevant rulings) and the room for maneuver which they sometimes enjoy support, according to the Commission, a presumption of aid. However, the Commission stresses that this does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules[54].

This leads the Commission to conclude that rulings should only aim at securing legal certainty regarding the tax treatment of certain transactions and may not

48 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §170 (see Commission notice on the application of the State aid rules to measures relating to direct business taxation, *Official Journal C* 10 December 1998, 384, §21).

49 C. Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, Alphen aan den Rijn, Kluwer Law International, 233-234. (2014).

50 ECJ 26 September 1996, *France v. Commission* ('*Kimberly Clark Sopalin*'), case C-241/94, §23-24. See also ECJ 29 June 1999, *Déménagements-Manutention Transport SA* ('*DMT*'), case C-256/97, §27; GC 6 March 2002, *Álava*, T-92/00 and T-103/00, §35; ECJ 18 July 2013, *P Oy*, case C-6/12, §27.

51 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §171 (see Commission notice on the application of the State aid rules to measures relating to direct business taxation, *Official Journal C* 10 December 1998, 384, §21).

52 To the extent that the interpretation of the tax provision at issue in the tax ruling is an advantageous deviation from the perspective of the taxpayer. Otherwise, there would not be any advantage (although one could argue, on the basis of historic (asymmetric tax burden) case-law of the ECJ, that a selective *dis*advantage (e.g. formulating tax legislation in a way that 1% of taxpayers is actually subject to tax whereas 99% of taxpayers is not, can also give rise to State aid for the group of 99%).

53 The Draft Commission Notice also contains a section regarding Tax Settlements (a dispute resolution mechanism), see Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §172-173.

54 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §175.

result in the situation where the enterprise that has applied for the ruling is subject to reduced taxation compared to other enterprises that find themselves in a situation that *de jure* and *de facto* is similar to the applicant enterprise (but that have not been granted a ruling). The Commission uses the example of fixed margins to determine the taxable base as an example that could very well be a form of State aid[55]. The Commission concludes that rulings are selective when "[…] the tax authorities have discretion in granting administrative rulings; […] the rulings are not available to undertakings in a similar legal and factual situation; […] the administration appears to apply a more 'favourable' discretionary tax treatment compared with other taxpayers in a similar factual and legal situation; […] the ruling has been issued in contradiction to the applicable tax provisions and has resulted in a lower amount of tax"[56].

The Notice[57] is not a legally binding instrument, yet clearly illustrates the line of reasoning of the Commission when confronted with a potential case of prohibited State aid. Nonetheless, we doubt whether this instrument offers sufficient guidance for and comfort to the undertakings that apply for a ruling and therefore must apply (and comply with) State aid rules, despite the fact that the notice undoubtedly has its merits[58]. For one, the focus of the Commission seems to lie with the criterion of selectivity[59], even though it also contains references to the other elements (listed above) that must be present in order to avail of State aid. By not differentiating more clearly between the different criteria of State aid it is made more difficult to properly understand the Notice and, consequently, whether a specific ruling actually embeds an aid component. Secondly, inevitably certain important nuances will be lost, allowing for the reviewing authority (*in casu* presumably the Commission) to jump to the wrong conclusions. That is why in the following paragraphs we will analyze more systematically whether and under which circumstances rulings could be potentially problematic in light of EU State aid rules.

Before starting with this analysis, we first shed more light on the presumptions of State aid set forth by the Commission. According to the Commission, there is a presumption of selectivity, or even of State aid as such (See above) when (i)

55 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §176.
56 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §177.
57 Even when this (draft) Notice is finalized.
58 Others appear to welcome the policy set forth in the Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, see *e.g.* T. Lyons, "The modernisation of EU state aid law and taxation", *BTR, 118. (2014)*
59 This can also be derived from the section in which this is dealt with in the Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, namely as a part of section 5 concerning the notion of selectivity.

the tax administration has a discretionary power and (ii) the rulings are not being published.

As far as the latter is concerned, Belgium is amongst the best pupils in the class because, contrary to several other Member States, it systematically publishes its rulings, albeit in anonymized form. The presumption of State aid based on opacity of the ruling system (which could even be criticized)[60], therefore, does not apply in a Belgian context and, as such, will not be discussed more in detail in the present contribution. Please note, however, that this viewpoint has incentivized certain Member States, amongst which Luxembourg is noted, to start publishing the rulings that have been issued.

Moreover, as far as the former presumption is concerned, it is to be noted that the Belgian tax administration does not, as such, avail of a (genuine) discretionary power (see *supra*) when taking into account constitutional and other legislative limits to its power. To the contrary, the tax administration has circumscribed powers, it being endowed with a certain margin of appreciation that is inherent to the (un)clarity of legal provisions[61]. This is probably the "room for maneuver" that the Commission refers to in its Notice, to which the same presumption applies (see above). This will be discussed more in detail below.

The abovementioned two presumptions apply equally to stabilization contracts. Indeed, if and to the extent such contracts remain unpublished. According to the Commission there will be a presumption of State aid. The same holds true as far as the criterion of discretionary power is concerned. The latter criterion may prove to be more problematic in the case of Colombian stabilization contracts because, apparently, these instruments are more heavily criticized than Belgian rulings with regard to conformity with the constitution and the principle of separation of powers[62]. We understand that this is one of the main reasons why in 2012 the Colombian Government and the Legislative decided to terminate the granting of new stabilization contracts[63].

60 See F.A Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift voor Staatssteun, 119. (2013).*

61 E. Van De Velde, *'Afspraken' met de fiscus: de grenzen, juridische kwalificatie en rechtsgevolgen*, Gent, Larcier, 2009, 292-296 and E. Warson, *Invulling en precedentswaarde van rulings*, Gent, Larcier, 2011, *e.g.* 57 and 113. The following authors defend the position that the tax administration has strictly circumscribed powers: T. Afschrift, "Le respect du principe de la légalité de l'impôt par le service des décisions anticipées", *RGCF* 2008, 441 and S. Van Crombrugge, *De grondregels van het Belgisch Fiscaal recht*, Kalmthout, Biblo, 38, nr. 16. (2013).

62 See A. Pereira, "Legal Stability Contracts in Colombia: An appropriate incentive for investments? Historical causes and impact analysis of Law 963 of 2005", (2013) *12 Rich. J. Global L. & Bus.*, 239 (with references).

63 Art. 166 of Law 1607.

3.2. Analysis of the State aid criteria

3.2.1. Is the beneficiary an 'undertaking'?

In chapter 3 we outlined the 4 constitutive elements that define the concept of 'State aid'. It has to be noted, however, that on the basis of the definition of State aid laid down in Article 107(1) TFEU, State aid rules can only apply if the recipient of the aid is an 'undertaking'[64].

One can derive from case law of the ECJ that the concept of an 'undertaking' must be defined autonomously (*i.e.* irrespective of definitions embedded in the domestic legislation of the Member States) and covers "any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed"[65] On the basis of established case law of the ECJ, an 'economic activity' means "any activity consisting in offering goods or services on a given market"[66]. This implies that the exercise to determine whether or not advance rulings constitute State aid pursuant to article 107(1) TFEU must only be performed if the taxpayer concerned is an undertaking, *i.e.* when such taxpayer carries out an economic activity. In principle this will not be the case for taxpayers who do not offer goods or provide services on a market, such as private individuals, employees, consumers and passive investors[67]. However, when the (tax) advantages are indirectly to the benefit of an undertaking, a measure can constitute State aid as far as the conditions thereto have been fulfilled (see below)[68]. When one would assess the compatibility of stabilization contracts with EU State aid law[69], the same analysis must be made. That said, as these types of contracts are typically concluded in the fra-

64 K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 2013, 25; M. Bungenberg, "Anwendungsbereich des europäischen Beihilfenrechts und Ausnahmen" in A. Birnstiel e.a., *Europäisches Beihilfenrecht*, Baden-Baden, Nomos, 2013, 109; Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §6.

65 ECJ 23 March 2006, case C-237/04, *Enirisorse v. Sotacarbo*, §28-29; ECJ 19 December 2012, case C-288/11, *Mitteldeutsche Flughafen*, §50; Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, § 7-8 and 12.

66 ECJ 10 January 2006, case C-222/04, *Cassa di Risparmio di Firenze*, §107; ECJ 16 June 1987, case C-118/85, *Commission v. Italy*, §7; ECJ 12 September 2000, joined cases C-180/98 to C-184/98, *Pavel Pavlov*, §75.

67 M. Bungenberg, "Anwendungsbereich des europäischen Beihilfenrechts und Ausnahmen" in A. Birnstiel e.a., *Europäisches Beihilfenrecht*, Baden-Baden, Nomos, 2013, 109; Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §17, with reference to ECJ 10 January 2006, case C-222/04, *Cassa di Risparmio di Firenze*, §107-188 and §125.

68 K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 2013, 28-29; M. Bungenberg, "Anwendungsbereich des europäischen Beihilfenrechts und Ausnahmen" in A. Birnstiel e.a., *Europäisches Beihilfenrecht*, Baden-Baden, Nomos, 2013, 109-110. Such indirect advantages should be distinguished from mere secondary economic effects that are inherent to almost all State aid measures, *e.g.* through an increase of output (Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §75).

69 Evidently, Latin American countries are not subject to EU State aid rules.

mework of (economic) investments in the granting State, this requirement should not raise particular concerns.

3.2.2. Is there an 'advantage' that is 'granted through State resources'?

As a general principle, Belgian ruling practice grants every taxpayer the right to gain insight on the viewpoint of the tax administration on the manner in which specific provisions will be applied to a predefined situation (without having to pay consideration for the issuance of the ruling)[70]. Beyond doubt this is to the benefit of legal certainty. In our opinion, however, it is highly unlikely that the granting of legal certainty is, on a standalone basis, an 'advantage' (see nr. 21) that is 'granted through state resources' (see nr. 22). As a result, one could come to the conclusion that rulings, *prima facie*, do not constitute a form of prohibited state aid, because the 4 conditions thereto have not been met (cumulatively).

According to settled case-law of the Court of Justice of the European Union (CJEU), the concept of an 'advantage' encompasses all measures that lead to an improvement in the economic and/or financial position of the beneficiary[71]. The concept does not only encompass positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect[72]. Normal burdens are those that an enterprise must carry under normal market circumstances, such as taxes. Therefore, in order to identify a tax advantage, a derogation must exist from "*normal taxation*"[73] (existing at the time the *in casu* administrative tax measure is adopted).[74]

Defining an advantage as a derogation from normal taxation implies that the assessment of whether an advantage exists has two limbs: (i) an identification of the tax position of the beneficiary *without* the alleged aid measure, and (ii)

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70 The BRO does not collect any fee from taxpayers that apply for and receive a ruling.

71 GC 21 May 2010, joined cases T-425/04, T-444/04, T-450/04 and T-456/04, §231, *France e.a. v. Commission*, overruled by ECJ 19 March 2013, cases C-399/10 and 401/10, *Bouygues and Bouygues Telecom*, but on different grounds.

72 ECJ 23 February 1961, case C-30/59, *De Gezamenlijke Steenkolenmijnen in Limburg*, §42; ECJ 15 March 1994, case C-387/92, *Banco Exterior de España*, §13; ECJ 2 July 1974, case C-173/73, *Italy v. Commission*, §36-39; ECJ 8 November 2001, case C-143/99, *Adria-Wien Pipeline*, §38; ECJ 8 September 2011, joined cases C-78/08 to C-80/08, *Paint Graphos*, §45; ECJ 15 November 2011, joined cases C-106/09 and C-107/09, *Gibraltar*, §71.

73 GC, 7 Mar. 2012, case T-210/02 RENV, *British Aggregates*, §49; GC 1 July 2004, case T-308/00, Salzgitter, §81. Normal taxation consists of "*the tax provisions (…) which would normally have been applicable in the absence of the scheme*" (GC, 1 July 2010, case T-335/08, BNP Paribas and BNL v Commission, §169).

74 Indeed, as per settled case law, "it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time" (ECJ 8 November 2001, case C-143/99, Adria-Wien Pipeline, §41; GC, 1 July 2010, case T-335/08, BNP Paribas and BNL v Commission, §204).

establishing whether the beneficiary's tax situation improves *with* the alleged aid measure. As a result, the authors submit that a tax ruling would only imply the conveying of an advantage if the recipient thereof would pay less taxes with the tax ruling than it would pay without the tax ruling.

In light of the above, *granting legal certainty* to taxpayers through tax rulings does not, in our opinion, constitute an 'advantage' for such taxpayer[75]. This is because merely offering legal certainty does not imply the taxpayer being entitled to a lower taxation compared to a situation absent a tax ruling. This conclusion applies even though the rulings are granted without consideration because when granting rulings, the BRO –being part of the Ministry of Finance– merely exercises one of the functions of the State executive as defined by law, aimed at improving legal certainty to taxpayers. Allowing for legal certainty is, in our opinion, an exercise of public powers or a 'State prerogative'[76], meaning a non-economic activity that is performed by the government *qualitate qua*[77]. On the basis thereof, one could argue that the expense associated therewith must necessarily be borne by the government[78] and that, in principle, this should fall outside the scope of State aid[79].

We are of the opinion that this viewpoint has been confirmed implicitly in the 2003 Decision of the Commission regarding the so-called Belgian coordination centers. After having made a distinction between an advance ruling practice and the underlying legal provisions, the European Commission argues that "in principle neither authorization procedures, nor advance rulings as such are a source of economic advantages […]. An advance ruling from the tax administration on how

75 *Pro*: Dec.Comm., 23 Apr. 2003, C-26/2003 (ex N 351/02), Belgian coordination centres, §25 (also see below). Possibly *contra*: P. Nicolaides and M. Kleis, "Where is the Advantage?", *EStAL* 2007, 615, with reference to Commission Decision of 24 June 2003 regarding Berlin measures for economic development, case 2004/125: ordinary expenses "include outlays caused by compliance with laws, regulations and contractual obligations".

76 On these concepts, see Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §18, with reference to ECJ 16 June 1987, case C-118/85, *Commission v. Italy*, §7-8; ECJ 4 May 1988, case C-30/87, *Corinne Bodson*, §18 and ECJ 19 January 1994, case C-364/92, *SAT Fluggesellschaft v. Eurocontrol*, §30.

77 See also European Commission, *Guide to the application of EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services*, SWD(2013) 53, 29 April 2013 and F.A Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift voor Staatssteun* 2013, 119-120. The fact that there is a market of (fiscal) advisory services does not alter this observation, because it is difficult to imagine that the BRO and such advisors would become actual competitors in that market, see F.A Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift* voor Staatssteun 2013, 120.

78 The financial burden the government bears when exercising a competency of public authority is, logically, not inherent to normal expenses associated with an enterprise (M. Peeters, *Staatssteun in de Europese Unie*, Brugge, Die Keure, 2012, 312).

79 This also appears to be confirmed by Article 2 of Protocol 26 to the TFEU: "The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest".

a specific tax measure will be applied in a particular situation in which a taxpayer finds himself, [increases] legal certainty of the enterprise concerned but does not, as such, confer […] an economic advantage. Moreover, the applicable legal provisions State that an advance ruling cannot result in an exemption or reduction of taxes"[80].

One could argue that essentially the same holds true as far as stability contracts are concerned. The reason is that stability contracts also aim at improving legal certainty in order to create positive investment climate. As is the case for rulings, it is doubtful whether providing for legal certainty as such can qualify as an advantage for State aid purposes.

The question remains, however, whether this parallel between rulings and stability contracts as far as providing legal certainty is concerned, is as straightforward as it appears initially. The authors believe that the nature itself of a stability contract could lead to conclusion that this is not the case, mainly for two potential reasons: Firstly, one could take the view that a stability contract goes beyond merely improving legal certainty because it gives a taxpayer a guarantee that he will be protected against future legislative changes (namely through an exemption or compensation upon any future legislative change). We believe this argument does not allow to differentiate between Belgian rulings and stability contracts. Indeed, even though it is correct that stability contract guarantee a certain outcome, the same argument essentially holds true as far as a Belgian rulings are concerned: a ruling also 'guarantees' a certain tax treatment to the taxpayer that applied for a ruling. The only difference between a Belgian ruling and a stability contract is that such outcome is no longer guaranteed in case of legislative changes (whereas the nature of a stability contract is exactly to guarantee such outcome in case of legislative changes).

The authors believe a second argument exists that is more convincing to differentiate between Belgian rulings and stability contracts, namely as far as the effect is concerned that such an instrument has on the position of the taxpayer. Indeed, contrary to a Belgian ruling, a stability contract can result in an exemption or reduction of taxes: in case of legislative change, the taxpayer (investor) who obtained a ruling will either be exempt from the application of the revised or newly introduced legal provision and/or will receive appropriate compensation so as to bring such taxpayer in a position as if no such legislative change had taken place.

The abovementioned second argument could potentially be used to differentiate between Belgian rulings and stabilization contracts and to successfully argue

80 Unofficial translation (from Dutch) of Dec.Comm., 23 Apr. 2003, C-26/2003 (ex N 351/02), Belgian coordination centres, §25.

that stabilization contracts (contrary to Belgian rulings) do confer an 'advantage' to the taxpayer. This does not mean, however, that stabilization contracts should automatically be deemed State aid. This is discussed in more detail below.

Even if there would be an advantage –quod non[81]– such advantage must be "granted by a Member State or through State resources". 'Granted by a Member State' implies that the decision to grant an advantage must be imputable to the Member State, (for example via an action of the State Executive)[82]. Given that the BRO –as a service within the Ministry of Finance– acts as a State Executive when granting a ruling, this condition should not raise any specific concerns. The same holds true in case of stabilization contracts.

It is insufficient, however, that the advantage is granted by a State; the advantage must also be granted through State resources. Despite the wording of Article 107(1) TFEU ("or"), on the basis of case law both conditions must be cumulatively met ("and")[83]. The requirement that the advantage must be 'granted through State resources' embeds, similar to the concept of an 'advantage', a positive and a negative dimension[84]. Not only a transfer of State resources (*e.g.* subsidies), but also a permanent disposal of such resources (*e.g.* though lower tax revenue) qualifies[85]. However, financing through State resources logically requires the existence of a well-defined financial burden for the State[86]. In other words, improving the general economic and legal 'playing field' for market participants does not in principle qualify as prohibited State aid[87]. In the authors' opinion, allowing for enhanced legal certainty through rulings seems to aim at creating such a playing

81 At least as far as Belgian rulings are concerned. As far as stability contracts are concerned, as discussed above, more convincing arguments are available to acknowledge the presence of an 'advantage'.

82 C. Quigley, *European state aid law and policy (2nd edition)*, Oxford, Hart, 2009, 13.

83 K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 2013, 20 and 61; Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU,§ 41; *e.g.* ECJ 24 January 1978, case C-82/77, *Van Tiggele*, §24; ECJ 17 March 1993, cases C-72/91 and C-73/91, *Sloman Neptun*, §19 and §21; ECJ 30 November 1993, case C-189/91, §16-17, *Kirsammer-Hack*; ECJ 7 May 1998, cases C-52/97 to C-54/97, *Viscido e.a.*, §13-14; ECJ 1 December 1998, case C-200/97, *Ecotrade*, §35; ECJ 13 March 2001, case C-379/98, *PreussenElektra*, §58; ECJ 16 May 2002, *France v. Commission*, case C-482/99, *Stardust Marine*, §24.

84 In our opinion the concept of an 'advantage' requires an inquiry into (the receipt thereof by) the beneficiary, whereas the concept of a financial burden requires an inquiry into the (action taken by the) grantor of the advantage.

85 K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 2013, 66; See a.o. ECJ 15 March 1994, case C-387/92, *Banco Exterior de España*, §14; ECJ 22 June 2006, joined cases C-182/03 and C-217/03, *Belgium and Forum 187*, §129.

86 A. Biondi, "State Aid Is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid", *CMLR* 2013, 1724; C. Quigley, *European State Aid Law and Policy (2nd Ed.)*, Oxford, Hart Publishing, 2009, 19; M. Heidenhain, *European State Aid Law*, München, Beck, 2010, Chapter 1, §1, A., n° 1.

87 W. Schön, "Taxation and State Aid Law in the European Union", *CMLR* 1999, 921; P. Nicolaides, *Essays on Law and Economics of State Aid*, Universiteit Maastricht, 2008, 29 and 31; In this sense, see ECJ 13 March 2001, case C-379/98, *PreussenElektra*, §58.

field[88]. Therefore, one could argue that, as a rule, rulings do not qualify as State aid because there is no 'grant through State resources'.

The assessment appears to be more difficult as far as stabilization contracts are concerned. To a large extent, the same reasoning applied above to the case of rulings is extensible to stabilization contracts. Through stabilization contracts, a State also aims at improving the general economic and legal 'playing field' for market participants. Therefore, one could equally argue that stabilization contracts do not qualify as State aid because there is no 'grant through State resources'. However, as discussed above, a stabilization contract differentiates itself from a ruling because the former allows (within certain limits) for the taxpayer-applicant to receive certain exemptions of differences in treatment as compared to the situation arising from normal taxation. In that sense, a stabilization contract has similar characteristics as what is defined below as a 'benefit granting ruling', in which case conformity with State aid rules must be monitored closely.

Based on the analysis above, in our opinion, *merely improving legal certainty* as such does not seem to fall within the scope of application of article 107(1) TFEU (in absence of an 'advantage' that is 'funded through State resources'). This is confirmed in the Commission's draft Notice on State aid, which submits that the EU State aid rules do "not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules".[89] However, this does not imply that rulings can never be deemed prohibited State aid. Indeed, a decrease in taxes (*i.e.* an advantage funded through government means, see above) can 'take the form of' a tax ruling. That is why a distinction should be made between 'confirmatory' and 'benefit granting' rulings[90]. The former do not go beyond confirming the correct application of a legal provision with a view of improving legal certainty. The latter allow for the taxpayer to *deviate* from normal taxation. That 'benefit granting' rulings can amount to State aid is supported by the Commission's draft Notice on the notion of State aid referred to above, in which it is contended that "[every] decision by the administration that departs from the general tax rules […] leads in principle to a presumption of State aid".[91]

Because stabilization contracts allow for a derogation from normal taxation (through an exemption and/or compensation) for the taxpayer-applicant in case

88 In this sense, see R. Luja, "Staatssteun in de winstsfeer: een stand van zaken", *TFO* 2010, 61 e.a. and F.A. Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift voor Staatssteun* 2013, 120.

89 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §175.

90 This distinction and description are partially borrowed from F.A. Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift voor Staatssteun* 2013, 120.

91 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §171.

of legislative change, they closely resemble such benefit granting rulings (and therefore the conclusions drawn in this article as far as benefit granting rulings is concerned, should be equally applicable thereto). The argument explained above leads us to defend the position that 'confirmatory rulings' that merely provide an 'interpretation' of the tax provision(s) at issue fall outside the scope of State aid rules. As already discussed above, they merely aim at improving legal certainty[92]. 'Benefit granting rulings' that 'deviate' from the general tax rules, however, result in a tax saving (purposefully[93]) infringing on tax legislation. In that case, there is indeed an 'advantage' that has been 'granted through State resources', leading to the result that, in principle, there could be State aid present[94].

However, determining whether a ruling is 'confirmatory' or 'benefit granting' is not always straightforward. In cases where the law is sufficiently clear (*e.g.* a withholding tax of 25% on dividends applies) and/or clear guidance or a consistent practice exists as regards its interpretation, one could presumably more easily establish whether the tax authorities have agreed upon an interpretation and application of the tax provision at issue in the ruling that deviates from the normal or general application thereof. If that is the case, it is clear that a 'benefit granting' ruling exists (*e.g.* a withholding tax on dividends of 5% is applied). Nonetheless, in many situations where a tax ruling is granted, there is often a very thin line between an 'interpretation of' and a 'deviation from' the normal or general application of a tax provision. This is because the very *raison d'être* of tax rulings is to provide legal certainty in cases where it is most needed, *i.e.* when the normal application of the law is not obvious (and no clear guidance exists in this respect). This issue most often arises in the context of the interpretation and application of vague and open norms[95] which leave room for interpretation. Like many other legal systems,

92 F.A. Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift voor Staatssteun* 2013, 120.

93 In this respect, however, one must keep in mind that Art. 107(1) TFEU – according to settled case-law of the ECJ – does not distinguish between State measures by reference to their causes or aims but in relation to their effects (the so-called 'effects doctrine') (see e.g. ECJ 15 November 2011, joined cases C-106 P and C-107/09 P, *Gibraltar v. Commission*, §92). Therefore, it could be contended that the purpose of deviating from the general rules is not relevant for assessing whether State aid exists, and that even inadvertent and/or in good faith misapplications of tax provisions can amount to State aid. This is contrasted to an old case before the UK Court of Appeal, where it was held that only a *deliberate or persistent misapplication* by the tax authorities could qualify as State aid (*R v. Attorney General, ex parte ICI* [1987], 1 *CMLR* 72; see C. Quigley, *European State Aid Law and Policy (2nd Ed.)*, Oxford, Hart Publishing, 2009, 71 and references in n. 37). Moreover, authoritative scholars contend that this type of threshold may be sensible from an administrative point of view, i.e. to prevent the Commission from screening the administration of tax provisions in the whole European Union (W. Schön, 'Taxation and State Aid Law in the European Union', *CMLR* 1999, 920; L. Hancher, T. Ottervanger & P.J. Slot, *EU State Aids – 4th Edition*, London, Sweet & Maxwell, 2012, 336).

94 F.A. Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift voor Staatssteun* 2013, 120; see also W. Schön, "Taxation and State Aid Law in the European Union", *CMLR* 1999, 921.

95 B. Peeters, "Rechts(on)zekerheid in het belastingrecht", *TFR* 1994, 194; B. Peeters and T. Wustenberghs, "De verenigbaarheid van vage en onbepaalde normen met het fiscale legaliteits- en rechtszekerheidsbeginsel", *AFT* 1999, 112.

the Belgian tax system increasingly embeds such norms, such as the references in tax provisions to so-called 'abnormal or benevolent advantages'[96], 'real and sincere operations'[97], 'business motives'[98], 'other motives … than the avoidance of tax'[99], 'ultimate beneficiary'[100], etc. In other words, to some extent, there is a 'grey area' between confirmatory rulings and benefit granting rulings.

In this article we call this grey area the area of 'interpretative rulings'. These rulings are characterized by the fact that (i) the solution supported by such rulings is often only one out of many (legal) solutions available and (ii) a pool of rational taxpayers may legitimately differ in opinion on what an 'equitable' solution to the fiscal problem addressed in the ruling would have been[101].

In light of the above, the question arises as from what moment an 'interpretative ruling' becomes a 'benefit granting ruling'? Stated otherwise, what is the relevant threshold below which an interpretative ruling retains[102] its 'confirmatory' nature, and above which transforms into a 'benefit granting' one.

One approach (potentially the most effective one) could be for the European Commission to establish an autonomous EU threshold, which must then be respected by the various tax authorities of the EU Member States, regardless of the individual tax authority traditions and tax enforcement cultures existing in their national tax systems. However, the authors contend that such an approach is (at least for now) prohibited as it would infringe on the sovereignty the Member States have retained within the current distribution of competences within the EU in matters of direct taxation.[103]

Indeed, as per settled case-law of the EU Courts, the reference point of determining whether an 'advantage' exists in tax matters must be determined within the Member State in question.[104] In the authors' view, it therefore follows that determining whether a ruling 'merely interprets' or 'deviates' from the normal or general application of the tax provision at issue should be determined on the basis of

96 Art. 26, 79, 185*bis* and 207 of the Belgian Income Tax Code 1992 ('BITC 1992').
97 Art. 54 and 198, §1, 10° BITC 1992.
98 Art. 183*bis* BITC 1992.
99 Art. 344, §1 BITC 1992.
100 Art. 106, §4 of the Royal Decree implementing the BITC 1992.
101 F.A. Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift voor Staatssteun* 2013, 120.
102 In view of the authors, the Commission should start from the assumption that an administrative act (such as a tax rulings) is lawful and/or 'sound' from an EU State aid perspective.
103 See very similar W. Schön, 'Taxation and State Aid Law in the European Union', *CMLR* 1999, 923.
104 This is settled case-law of the EU Courts. One of the clearest confirmations thereof is found in GC 1 July 2004, case T-308/00, Salzgitter, §81: "When [an advantage] is being determined, comparison of the tax rules applicable in all of the Member States, or even some of them, would inevitably distort the aim and functioning of the provisions on the monitoring of State aid. In the absence of [EU] level harmonisation of the tax provisions of the Member States, such an approach would in effect compare different factual and legal situations arising from legislative and regulatory disparities between the Member States".

national tax law.[105] In that respect, it is submitted that a ruling should be considered as 'benefit granting' whenever it would not be upheld by a national reviewing authority, *i.e.* be qualified as *contra legem* under the tax legislation of that Member State.

In Belgium, like many other civil and common law jurisdictions, the moment at which a ruling is no longer upheld *c.q.* qualifies as *contra legem* can be pinpointed to the moment that the interpretation of tax legislation embedded in such a ruling is considered 'manifestly unreasonable'[106]. Determining whether this is the case requires a so-called marginal or limited review. A marginal or limited review is common where an administration (such as the tax authorities) have a certain margin of appreciation in taking a decision.[107] This margin of appreciation is always limited to what is permissible in light of higher legal norms such as the constitution[108] or general principles of law[109]. Therefore, a ruling goes against the law if there exists a general consensus that no other reasonably acting tax administration, could have reached the same conclusion under the same circumstances[110], or when it should have been clear from the start for any reasonable and diligent taxpayer that the law was being interpreted unreasonably in light of the prevailing interpretation thereof [111].

In such case, the ruling is considered as unlawful under Belgian law. As a result, the ruling loses its constraining effect vis-à-vis the Belgian tax administration, which (i) may not issue rulings that are not "in accordance with the legislation in force" and (ii) is no longer bound by and rulings going against the law (meaning: infringe domestic, European or treaty rules; see above, nr. 7). Therefore, in a Belgian domestic tax context, allowing for benefit granting rulings would defeat the purpose of a ruling. Based on the assumption that the BRO does not issue rulings that go against the law, we could come to the conclusion that such rulings – that

105 See also Quigley, who contends that "*remedial action in the sphere of national tax administration should generally remain solely within the province of national tax law*" (see C. Quigley, *European State Aid Law and Policy -2nd Ed.*, Oxford, Hart Publishing, 2009, 70).

106 This observation has even lead to the question whether it is appropriate for the European Commission or the EU Courts to assess the conduciveness of ruling in the first place, as these EU instances are generally unfamiliar with all nuances inherent to domestic tax legislation. See X, "The Commission joins the tax avoidance debate: announcement on Apple, Starbucks and Ford", http://uksala.org.

107 Above, it was clarified that the Belgian tax administration has circumscribed powers (see supra), yet also possesses a certain leeway or margin of appreciation a due to legal (un)clarity.

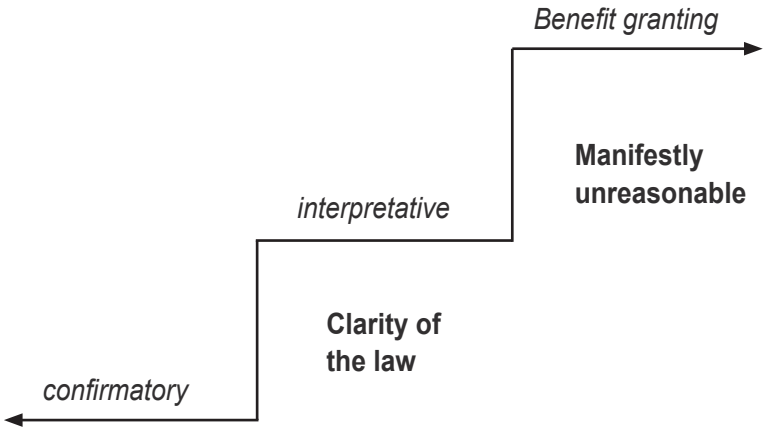
108 The principles of equality and legality.

109 The principles of good administration.

110 P. Van Orshoven, *Behoorlijke rechtsbedeling bij geschillen over directe rijksbelastingen*, Antwerpen, Kluwer Rechtswetenschappen, 1987, 16. In this sense, see also the Umicore Decision (Dec.Comm. 26 May 2011, C-76/2003 (*ex* NN 69/2003), Umicore, as discussed and interpreted by R. Luja (R. Luja, Vaststellingsovereenkomsten, de CCCTB en staatssteun", *WFR* 2012, 125 *et seq*.).

111 B. Peeters, "Het rechtszekerheidsbeginsel in het fiscaal recht: verduidelijking van het begrip gerechtvaardigde verwachting", *TFR* 2001, 171.

are as a matter of principle (or assumption) not of the benefit granting type– are compatible with EU State aid rules.



When a State issues an interpretative ruling, one could automatically deem such ruling prohibited State aid by using the argument that an opportunity existed to issue a ruling that was more beneficial for the State itself, *i.e.* that could have resulted in a heavier tax burden for the taxpayer concerned. This appears to be the approach adopted by the Commission in the pending in-depth investigations into the tax rulings obtained by Apple, Starbucks and Fiat and Amazon from resp. the Irish, Dutch and Luxembourg tax authorities.[112]

In our opinion, it could be successfully argued that these types of rulings are compliant with State aid rules because they merely offer legal certainty, which should not, as discussed above, meet the definition of an 'advantage' that has been 'granted through State resources'. In the end, the scope of an interpretative and a confirmatory ruling are essentially the same. The ruling merely results in the taxpayer receiving insight in the viewpoint of the tax administration regarding the tax treatment of an envisaged transaction prior to such transaction being effectively concluded. Asking for a ruling is not mandatory[113]. Rather than having a certain tax treatment confirmed in a ruling, the taxpayer could also have anticipated the positive outcome of the ruling process by simply filling out his tax return as if such a ruling had been granted. Without a ruling, however, the taxpayer incurs the risk that the tax administration *prima facie does* not follow his viewpoint. This alone appears to be a clear indication that interpretative rulings merely help to

112 There, it is *inter alia* insinuated that the tax authorities, when accepting a *transfer pricing* ruling, must look into all acceptable TP methods to check which one would provide the most budget-friendly result, i.e. maximizes tax revenues.

113 *Parl. St.* Kamer 2001-02, nr. 1918/001, 57.

attain legal[114] certainty and therefore should not be deemed constitute prohibited State aid[115]. This conclusion requires rethinking the weight attributed to the tax administration having a certain degree for maneuver (see above) in a discussion on State aid.

This leads us to conclude that only 'benefit granting rulings' potentially can qualify as prohibited State aid, contrary to confirmatory and interpretative rulings. Whether the same holds true for stabilization contracts, however, can be questioned. This is because stabilization contracts can very well imply an 'advantage' being conferred upon the taxpayers concerned to the extent that the tax treatment agreed upon between that taxpayer and the tax authorities would be more beneficial than an application of 'normal taxation' at the time the compatibility with State aid legislation is being assessed. Despite that, even if a 'benefit granting ruling' would be present, a case of prohibited State aid only exists if the criterion of selectivity is met. This is discussed more in detail below.

3.2.3. Is the ruling 'selective'?

As discussed above, selectivity arises when an 'advantage' is only available to a specific group of undertakings or productions instead of all undertakings in a similar factual and legal position. Generally speaking, this criterion requires that a measure is not a general measure that applies to the undertakings in the national economy as a whole, but a measure that derogates from a commonly applicable regime to the benefit of *certain* beneficiaries.

In tax matters the concept of selectivity is heavily debated. According to the 'standard' selectivity test of the ECJ, a measure is *prima facie* selective when such measure –as a derogation from the common or normal tax regime– is only open to certain market actors and not to all undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.[116] Such *prima facie* selectivity could be justified (meaning: not imply actual selectivity) by the nature or general scheme of the system of which it is

114 One could even doubt whether a ruling actually improves legal certainty. Indeed, at least theoretically, the tax administration could go back on its word by arguing that the ruling is not in line with the Law, resulting in the ruling to lose its validity (see above). In this case, the taxpayer will have to fall back on the applicable legal provisions, because when the ruling can be deemed in line with the Law after all, the ruling will continue to have effect, yet not on the basis of the ruling but on the basis of the underlying legal provisions. If, to the contrary, the ruling is deemed not in conformity with the Law, a court of law cannot apply the ruling. No rights can be claimed by taxpayers on the basis of a practice by the tax administration that is not in compliance with the Law (see T. Afschrift, "Le respect du principe de la légalité de l'impôt par le service des décisions anticipées", *RGCF* 2008, 447 with reference to Cass. 30 May 2008, *RGCF* nr. F06.0083.F).

115 F.A. Gunn and O.D. Heitling are not clear on this (they do not appear to come to a conclusion on this point).

116 ECJ 8 November 2001, case C-143/99, *Adria-Wien Pipeline*, §41.

part.[117] This would be the case if "[…] that measure results directly from the basic or guiding principles of its tax system"[118] Objectives external to the tax system (*e.g.* instrumentalist fiscal measures) do not, as a matter of principle, serve as grounds for justification. Moreover, justification presupposes that the rule of proportionality[119] has been met and that control and monitoring procedures have been put into place to prevent abuse[120].

In light of the above, one could argue that a ruling is only 'selective' when the possibility of requesting and/or obtaining the ruling[121] is only open to certain taxpayers and not to all taxpayers that are in a similar legal and economic position. The authors concede that the selectivity of a ruling (fourth criterion) and the question whether the ruling constitutes an advantage that has been funded through State resources (criterion one and two), however related, should be kept apart to the greatest extent possible in the State aid analysis. Only when all criteria are met (see above) will there be a case of prohibited State aid.

The above leads us to conclude that only 'selective benefit granting rulings' (*i.e.* not all 'benefit granting rulings') should qualify as prohibited State aid[122]. In the authors' opinion, the mere fact that an 'advantage' (as defined *supra*) is embedded in a tax ruling obtained by an individual undertaking does not necessarily mean that this undertaking is treated selectively better than other undertakings who are in a comparable legal and factual situation.[123] Nonetheless, adding the additional nuance that the benefit granting ruling needs to be selective in order to qualify as State aid[124] might prove to be (to a large extent) superfluous (if one accepts the threshold described above), because most likely these types of rulings are granted to only one or more specific taxpayer(s) (often secretly or in a non-transparent manner). Lack of transparency indeed often goes hand in hand with a manifestly

117 ECJ 8 November 2001, case C-143/99, *Adria-Wien Pipeline*, §42; ECJ 2 July 1974, case C-173/73, *Italy v. Commission*, §33.

118 ECJ 8 September 2011, joined cases C-78/08 to C-80/08, *Paint Graphos*, §65.

119 "Not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures". See ECJ 8 September 2011, joined cases C-78/08 tot C-80/08, *Paint Graphos*, §75.

120 "To prevent economic entities from choosing that particular legal form for the sole purpose of taking advantage of the tax benefits provided for that kind of undertaking". See ECJ 8 September 2011, joined cases C-78/08 to C-80/08, *Paint Graphos*, §74; K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 2013, 80.

121 This is something different from the *content* of the ruling itself.

122 See similarly also W. Schön, "Tax competition in Europe – General report", in W. Schön (ed.), *Tax competition in Europe*, Amsterdam, IBFD, 2003, 29.

123 This is either because the advantage embedded in the tax ruling is (i) open to all taxpayers that are in a similar legal and factual position, irrespective of whether they obtained a tax ruling or not, or (ii) because taxpayers that requested and obtained a tax ruling are not in a similar legal and factual position as the taxpayers that freely decided not to request (and thus obtain) a tax ruling.

124 If these would even exist, see above.

unreasonable or negotiable application of tax legislation resulting in an unequal treatment of taxpayers that find themselves in a comparable situation[125].

This general conclusion appears to correspond (partly)[126] to the Decision of the European Commission in the Umicore case[127]. In this case, the Commission argued that there can be a case of State aid where the amount of taxes due was lowered despite the applicable legal provisions (advantage granted though state resources) and such beneficial treatment did not apply to other taxpayers that found themselves in a comparable situation (selectivity)[128]/[129].

But what about 'selective confirmatory rulings' and 'selective interpretative rulings'? In our opinion, the following viewpoint taken on those types of rulings in the Draft notice of the Commission is accurate: when the possibility to apply a ruling is only granted to a specific group of undertakings and not to other enterprises that are objectively comparable, the ruling is indeed selective (see above). Implicitly (and from time to time even explicitly) the Commission seems to imply that in such a case there always is prohibited State aid pursuant to article 107(1) TFEU. In our opinion, the selective nature of a ruling is not related to whether or not the measure is granted through state resources. The comparative and selective 'advantage' with these types of rulings still relates to increasing legal certainty, which, as explained more in detail above, should fall outside the scope of State aid.

Moreover, the question arises whether in the Belgian legal system such selective (interpretative or confirmatory) rulings actually exist. As a general principle, each taxpayer has the possibility to apply for a ruling, about more or less the entire spectrum of substantive tax law (see above). It could therefore be unjustified to conclude that taxpayers that effectively use this possibility are deemed to be treated more advantageous 'selectively' than those taxpayers that choose not to apply for a ruling. Selectivity only exists in the absence of '*equality of access*' (meaning that not all taxpayers can apply for a ruling), not in the absence of '*equality of outcome*' (meaning that applying the regime equally to taxpayers does not result in an equal outcome for all taxpayers concerned)[130]. In this respect, it could also be argued that enterprises that have applied for a ruling, do not find themsel-

125 See *e.g.* OECD, *Harmful tax competition – An emerging global issue*, Paris, OECD, 1998, 27-28.
126 The 'Umicore-criteria' have been used to identify an 'advantage', even though these criteria also partially relate to the second ('through State resources) and fourth ('selectivity') criteria to avail of State aid.
127 Dec.Comm. 26 May 2011, C-76/2003 (*ex* NN 69/2003), §155.
128 In the Umicore-Decision, the Commission eventually ruled concluded that there was no prohibited State aid.
129 For a similar conclusion, see R. Luja, "Vaststellingsovereenkomsten, de CCCTB en staatssteun", *WFR* 2012, 125 *et seq*.
130 See J. Luts, "Compatibility of IP Box Regimes with EU State Aid Rules and Code of Conduct", *EC Tax Review* 2014, nr. 5, 265.

ves in a situation that is factually and legally comparable to those taxpayers that have not applied for a ruling[131], a result of which the condition of selectivity (see above) has not been met.

Certain taxpayers cannot apply for a ruling. This is the case when essential elements of the transaction or situation relate to a tax haven that does not cooperate with the OECD of when the transaction described in the ruling lacks economic substance in Belgium (see above). This differentiated treatment appears to be justifiable through the nature and purpose of the tax system[132]. Combatting tax avoidance and evasion is a cornerstone of a mature tax system[133].

The considerations mentioned about the criterion of 'selectivity' equally apply to stabilization contracts. However, as far as stabilization contracts are concerned, this criterion will likely pose less interpretation issues. Indeed, stabilization contracts typically include a threshold as far as the investment value is concerned in order to be able to apply for a stabilization contract. To the extent that such a threshold applies, it becomes difficult to deny that the practice is selective, as imposing a threshold automatically applies that those who do not meet the threshold are denied the benefit of a stabilization contract. The only argument against this viewpoint is that this differentiated treatment is justifiable through the nature and purpose of the tax system, *i.e.* that an effective system of stability contracts necessitates a *de minimis* rule as a way to effectively use a State's limited financial resources (in the sense that allowing even relatively small investments to benefit from the system of stability contracts requires more State resources than the benefit resulting from the contract). In our opinion, however, this argument is little convincing, as it is driven by merely budgetary concerns and/or attracting or retaining investments rather than the logic inherent to the tax system itself. In the (unlikely) event that no threshold applies, the abovementioned reasoning (and nuances) applicable to rulings should *mutatis mutandis* apply in the case of a stabilization contract.

4. Conclusion

Starting from the premise that the criteria to avail of State aid should be considered independently, this contribution aimed at performing an *in abstracto* analysis of these criteria in light of Belgian ruling practice. This analysis revealed that only

131 In the framework of the Belgian principle of equality in tax matters laid down in the Constitution, T. Vanwelckenhuyzen, "Les décisions anticipées en matière fiscale risquent-elles de créer une discrimination entre les contribuables?", *DAOR* 2005, 194.

132 Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, §184; ECJ 29 April 2004, case C-308/01, *GIL Insurance*, §73-79.

133 S. Douma, *Optimization of Tax Sovereignty and Free Movement*, Universiteit Leiden, 2011, 95.

in specific circumstances rulings could qualify as State aid, namely when they qualify as (i) an advantage granted through state funding (ii) that is selective.

Because the conditions for State aid to apply have to be met cumulatively, the (tentative) conclusion was that only 'selective benefit granting rulings' can qualify as State aid, as opposed to purely selective rulings, confirmatory or interpretative rulings, or a combination of both. This would mean that in Belgium, rulings cannot qualify as State aid, because the ruling regime is not selective and because a (*contra legem*) benefit granting ruling can, in principle, not be issued.

A different conclusion could be defended as far as stabilization contracts are concerned. The reason is that stabilization contracts appear to carry those characteristics that exactly define a ruling as a 'selective benefit granting ruling', namely that (i) they allow for taxpayers being granted an exemption or compensation from normally applicable (tax) legislation and (ii) generally a minimum threshold in terms of investment value will deny certain taxpayers the benefit of applying for a stability contract. This implies that it is more likely (than in case of – Belgian - rulings) that stabilization contracts are deemed prohibited State aid.

Whether the European Commission agrees with the abovementioned viewpoint on conformity of Belgian rulings with State aid rules and regulations remains to be seen. Whatever the outcome may be of the pending investigations into the tax ruling practice of the EU Member States, the days that 'sweetheart deals' could be concluded with the tax administration without any substantial legal impediments appear to be something of the past. This is because, as from now, the question whether a ruling is in line with State aid regulations will be monitored more closely on the European (and national) forum[134].

5. Bibliography

Legislation

Art. 170 Constitution.

Art. 172 Constitution.

Act of 24 December 2002 amending the corporate income tax regime by creating a system of advance rulings in tax matters, *Belgian Official Gazette* 31 December 2002.

Art. 26, 79, 185bis and 207 of the Belgian Income Tax Code 1992.

Art. 54 and 198, §1, 10° of the Belgian Income Tax Code 1992.

134 In the same sense, see F.A. Gunn, "Formeel onderzoek naar Nederlandse rulings", *NTFR* 2014, 1562 *et seq*.

Art. 183bis of the Belgian Income Tax Code 1992.

Art. 344, §1 of the Belgian Income Tax Code 1992.

Art. 106, §4 of the Royal Decree implementing the Belgian Income Tax Code 1992.

Article 107(1) of the Treaty on the Functioning of the European Union.

Article 108 of the Treaty on the Functioning of the European Union.

Council Regulation (EC) 659/1999 of 22 Mar. 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, OJ 27.03.1999, L 83, 1.

Article 2 of Protocol 26 to the Treaty on the Functioning of the European Union.

Parliamentary documents

Parl.St. Kamer 2001-02, nr. 1918/001.

Case law

ECJ 23 February 1961, case C-30/59, De Gezamenlijke Steenkolenmijnen in Limburg.

ECJ 2 July 1974, case C-173/73, Italy v. Commission.

ECJ 24 January 1978, case C-82/77, Van Tiggele.

ECJ 16 June 1987, case C-118/85, Commission v. Italy.

UK Court of Appeal, R v. Attorney General, ex parte ICI [1987], 1 CMLR 72.

ECJ 4 May 1988, case C-30/87, Corinne Bodson.

ECJ 17 March 1993, cases C-72/91 and C-73/91, Sloman Neptun.

ECJ 30 November 1993, case C-189/91, Kirsammer-Hack.

ECJ 19 January 1994, case C-364/92, SAT Fluggesellschaft v. Eurocontrol.

ECJ 15 March 1994, case C-387/92, Banco Exterior de España.

ECJ 26 September 1996, case C-241/94, France v. Commission ('Kimberly Clark Sopalin').

ECJ 7 May 1998, cases C-52/97 to C-54/97, Viscido e.a.

ECJ 1 December 1998, case C-200/97, Ecotrade.

ECJ 29 June 1999, case C-256/97, Déménagements-Manutention Transport SA ('DMT').

ECJ 16 May 2000, case C-83/98, Ladbroke Racing.

ECJ 12 September 2000, joined cases C-180/98 to C-184/98, Pavel Pavlov.

ECJ 13 March 2001, case C-379/98, PreussenElektra.

ECJ 8 November 2001, case C-143/99, Adria-Wien Pipeline.

GC 6 March 2002, T-92/00 and T-103/00, Álava.

ECJ 16 May 2002, France v. Commission, case C-482/99, Stardust Marine.

ECJ 29 April 2004, case C-308/01, GIL Insurance.

GC 1 July 2004, case T-308/00, Salzgitter.

ECJ 10 January 2006, case C-222/04, Cassa di Risparmio di Firenze.

ECJ 23 March 2006, case C-237/04, Enirisorse v. Sotacarbo.

ECJ 22 June 2006, joined cases C-182/03 and C-217/03, Belgium and Forum 187.

ECJ 22 December 2008, case C-487/06, British Aggregates.

GC 21 May 2010, joined cases T-425/04, T-444/04, T-450/04 and T-456/04, France e.a. v. Commission.

GC, 1 July 2010, case T-335/08, BNP Paribas and BNL v Commission.

ECJ 8 September 2011, joined cases C-78/08 to C-80/08, Paint Graphos.

ECJ 15 November 2011, joined cases C-106/09 and C-107/09, Gibraltar.

GC 7 March 2012, case T-210/02 RENV, British Aggregates.

ECJ 21 June 2012, case C-452/10, BNP Paribas.

ECJ 19 December 2012, case C-288/11, Mitteldeutsche Flughafen.

ECJ 19 March 2013, cases C-399/10 and 401/10, Bouygues and Bouygues Telecom.

ECJ 18 July 2013, case C-6/12, P Oy.

Administrative procedures

Dec.Comm., 23 Apr. 2003, C-26/2003 (ex N 351/02), Belgian coordination centres.

Dec.Comm. 26 May 2011, C-76/2003 (ex NN 69/2003), Umicore.

Dec.Comm., 11 Jun. 2014, C(2014) 3606, Alleged aid to Apple (SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland)

Dec.Comm., 11 Jun. 2014, C(2014) 3626, Alleged aid to Starbucks (SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – the Netherlands)

Dec.Comm., 11 Jun. 2014, C(2014) 3627, Alleged aid to FFT (SA.38375 (2014/C) (ex 2014/NN) (ex 2014/CP) – Luxembourg).

Dec.Comm., 7 Oct. 2014, C(2014) 7156, Alleged aid to Amazon by way of a tax ruling (SA.38944 (2014/C)).

Administrative guidance

Commission notice on the application of the State aid rules to measures relating to direct business taxation, *Official Journal C* 10 December 1998, 384 ff.

Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html.

European Commission, *Guide to the application of EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services*, SWD(2013) 53, 29 April 2013.

OECD, *Harmful tax competition – An emerging global issue*, Paris, OECD, 1998, www.oecd.org.

Legal doctrine ((chapters in) books)

K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 2013, 688 p.

M. Bungenberg, "Anwendungsbereich des europäischen Beihilfenrechts und Ausnahmen"

in A. Birnstiel e.a., *Europäisches Beihilfenrecht*, Baden-Baden, Nomos, 2013, 101-844.

S. Douma, *Optimization of Tax Sovereignty and Free Movement*, Universiteit Leiden, 2011, https://openaccess.leidenuniv.nl.

L. Hancher, T. Ottervanger & P.J. Slot, *EU State Aids – 4th Edition*, London, Sweet & Maxwell, 2012, 1284 p.

M. Heidenhain, *European State Aid Law*, München, Beck, 2010, www.beck.de.

P. Nicolaides, *Essays on Law and Economics of State Aid*, Universiteit Maastricht, 2008, http://digitalarchive.maastrichtuniversity.nl/

B. Peeters, "Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?" in B. Peeters and J. Velaers (eds.), *De Grondwet in groothoekperspectief. Liber amicorum discipulorumque Karel Rimanque*, Antwerpen, Intersentia, 2007, at 509.

M. Peeters, *Staatssteun in de Europese Unie*, Brugge, Die Keure, 2012, 732 p.

A. Pereira, "Legal Stability Contracts in Colombia: An appropriate incentive for investments? Historical causes and impact analysis of Law 963 of 2005", *12 Rich. J. Global L. & Bus.* 2013, 237-276.

C. Quigley, *European State Aid Law and Policy (2nd Ed.)*, Oxford, Hart Publishing, 2009, 640 p.

W. Schön, "Tax competition in Europe – General report", in W. Schön (ed.), *Tax competition in Europe*, Amsterdam, IBFD, 2003, p. 1 ff.

B. Terra and P. Wattel, *European Tax* Law, Deventer, Kluwer 2012, 1144 p.

E. Van de velde, *'Afspraken' met de fiscus: de grenzen, juridische kwalificatie en rechtsgevolgen*, Gent, Larcier, 2009, 612 p.

S. Van Crombrugge, *De grondregels van het Belgisch Fiscaal recht*, Kalmthout, Biblo, 2013, 77 p.

P. Van Orshoven, *Behoorlijke rechtsbedeling bij geschillen over directe rijksbelastingen*, Antwerpen, Kluwer Rechtswetenschappen, 1987, 588 p.

H. Verstraete and M. Isenbaert, "Kritische bespreking van het rulingbeleid: capita selecta", in X, *Themis Fiscaal recht 2008-2009*, 31-45.

E. Warson, *Invulling en precedentswaarde van rulings*, Gent, Larcier, 2011, 214 p.

Legal doctrine (articles)

T. Afschrift, "Le respect du principe de la légalité de l'impôt par le service des décisions anticipées", *RGCF* 2008, 441-461.

A. Biondi, "State Aid Is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid", *Common Market Law Review* 2013, 1719-1743.

F.A. Gunn, "Fiscale staatssteun: dansen op de vulkaan", *NTFR* 2011, 1350 ff.

F.A Gunn and O.D. Heitling, "Tax rulings en de Europese staatssteunregels", *Tijdschrift voor* Staatssteun 2013, 119.

F.A. Gunn, "Europese consultatie over fiscale staatssteun", *NTFR* 2014, 5 ff.

F.A. Gunn, "Formeel onderzoek naar Nederlandse rulings", *NTFR* 2014, 1562 ff.

R. Luja, "Staatssteun in de winstsfeer: een stand van zaken", *TFO* 2010, 61-73.

R. Luja, Vaststellingsovereenkomsten, de CCCTB en staatssteun", *WFR* 2012, 125 ff.

J. Luts, "Compatibility of IP Box Regimes with EU State Aid Rules and Code of Conduct", *EC Tax Review* 2014, nr. 5, 258-283.

T. Lyons, "The modernisation of EU state aid law and taxation", *BTR* 2014, 113-119.

P. Nicolaides and M. Kleis, "Where is the Advantage?", *EStAL* 2007, 615-637.

B. Peeters, "Rechts(on)zekerheid in het belastingrecht", *TFR* 1994, 179-194.

B. Peeters and T. Wustenberghs, "De verenigbaarheid van vage en onbepaalde normen met het fiscale legaliteits- en rechtszekerheidsbeginsel", *AFT* 1999, 94-112.

B. Peeters, "Het rechtszekerheidsbeginsel in het fiscaal recht: verduidelijking van het begrip gerechtvaardigde verwachting", *TFR* 2001, 167-171.

W. Schön, "Taxation and State Aid Law in the European Union", *Common Market Law Review* 1999, 911-936.

T. Vanwelckenhuyzen, "Les décisions anticipées en matière fiscale risquent-elles de créer une discrimination entre les contribuables?", *DAOR* 2005, 185-208.

X, "The Commission joins the tax avoidance debate: announcement on Apple, Starbucks and Ford", http://uksala.org.

Press releases and speeches

Press Release, European Commission, Brussels, 1 Oct. 2014, IP/14/01073.

Press Release, European Commission, Brussels, 17 Dec. 2014, IP/14/2742.

Press Release, European Commission, Brussels, 3 Feb. 2015, IP/15/4080.

Speech Almunia SPEECH/14/119.