

EU Tax Law and Policy in the 21st Century

EUCOTAX Series on European Taxation

VOLUME 55

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Introduction

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Contents/Subjects

The EUCOTAX series covers a wide range of topics in European tax law. For example tax treaties, EC case law, tax planning, exchange of information and VAT. The series is well-known for its high-quality research and practical solutions.

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Practitioners and academics dealing with European tax law.

Frequency of Publication

2-3 new volumes published each year.

The titles published in this series are listed at the end of this volume.

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Preface and Acknowledgements

This book constitutes the latest volume in a series of publications by the University of Luxembourg's ATOZ Chair for European and International Taxation, which are based on annual conferences on current issues of international and European tax law and were previously published in a separate Series called '*International Tax Conferences of the University of Luxembourg*'. These conferences bring together leading tax experts from various areas of tax practice, academia, and governmental entities to facilitate high-level discussions that are both topical and that foster dialogue among the different actors.

This book is the result of two conferences held in 2015 and 2016, respectively, on 'Primary Law Limits to European Taxation' and 'EU Tax Policy in the 21st Century' and combine a unique perspective on both the law and the policy of European taxation at this time. The authors finalized their chapters over the course of several months following each conference, updating them in early 2017 to incorporate relevant points and additional information generated since the discussion at the conference, as well as addressing more recent developments in legislation and the case law. As this was particularly burdensome for those contributors who participated in the first of the two conferences, we are especially grateful to them for their continued commitment to complete their particular chapters in a timely manner. Although such a book necessarily provides a snapshot of the current state of affairs in a constantly evolving context, the analysis provided by the authors allows it to remain relevant as the law develops further over the years to come.

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Preface and Acknowledgements

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CHAPTER 5

Discretionary Power of Tax Authorities as a State Aid Problem

*Michael Lang & Alexander Zeiler**

§5.01 DISCRETION AS A LEGAL PHENOMENON

In this chapter, different aspects of tax authorities' discretionary power are examined in light of European Union (EU) State aid law. The first part will approach discretion from a general legal perspective and describe its role in a legal system. Based on these findings, the case law of the European Court of Justice (ECJ) regarding Member State provisions granting tax authorities a margin of discretion in their decision-making will be analysed in order to determine when such provisions may be considered State aid. Afterwards, the assessment of selectivity in the context of individual administrative decisions will be discussed. Finally, the chapter will examine the compatibility of tax rulings with State aid law.

Discretion is a phenomenon practically inherent in every legal order. Usually, positive law is created through the dynamic process of gradual concretization within a hierarchal structure of norms.¹ When enacting the law a competent organ always has to interpret a relatively abstract rule in order to reach a more concrete decision. During that process of gradual concretization, that organ is bound by a higher set of norms that establish the framework in which it has to come to its own decision. Within that leeway, contemplated by the higher norm, it is free to decide according to its own values.² Therefore, the application of the law is always a dualism of applying a higher norm, which binds the decision to a certain extent, and of creating new law within the

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1. Hans Kelsen, *Reine Rechtslehre* 228 et seq. (2d ed., 1960).

2. *Ibid.* at 351.

latitude provided by that higher norm.³ If, for example, the legislator passes a new law, it has, on the one hand, a margin of discretion to enact a new statute according to the results reached in the political process, but, on the other hand, it is constrained by formal or material requirements stipulated in the constitution, such as fundamental rights. The same is true for authorities having the competence to flesh out a general law in the form of more detailed, abstract rules. Within the framework prescribed by the higher-ranked law, authorities are able to create new law and, therefore, can concretize the general law according to its own assessment of the relevant circumstances. Finally, the situation is not different where authorities have to decide a particular case. By making an individual decision based on general, abstract norms, authorities are bound by these rules; but, depending on their scope, they have more or less room to manoeuvre in order to come to a final decision. Therefore, the character of a legal decision at each level of the legal hierarchy is not different from a qualitative perspective. The competent authorities applying a higher norm are always bound, to a certain extent, by that higher rule, but, at the same time, they have a certain leeway in their decision-making, which they have to fill with their own values. The only difference between the various levels of law-making is the concrete degree of latitude enjoyed by the respective organ in its actual decision-making. In either case, the legislator or the authorities have discretion with respect to the manner of creating a lower norm or making a legal decision. Whereas the general legislator is just bound by the constitution and, therefore, has relatively far-reaching discretionary power to create new law, the authorities' leeway in applying more specific rules may be relatively minor.⁴

Consequently, the discretionary power of authorities cannot be considered the mere result of the indefinite nature of legal language or even as an arbitrary effect of the law. Rather, it is a phenomenon inherent in a system of positive law caused by the need to provide a relatively abstract norm in order to reach a relatively concrete decision.⁵ There will always remain a certain amount of room to manoeuvre, as an abstract rule governing a more concrete decision can, by nature, only regulate certain elements of a decision, but must leave other aspects open for the assessment of the authorities in a specific situation.⁶ Even if a very detailed tax rule does not seem to leave any room for interpretation and consequently reduces the tax authorities' discretion to nearly zero, they can, at least, still decide which tax returns handed in they want to deal first with and, thereby, influence which taxpayers eventually have to pay their taxes earlier when compared to others.⁷ In the end, a general abstract rule, regardless of its level of detail, can never determine all of the relevant circumstances of a real situation.

3. Adolf Merkl, *Allgemeines Verwaltungsrecht* 142 (1969).

4. Kelsen, *supra* n. 1, at 351.

5. Merkl, *supra* n. 2, at 144.

6. *Ibid.* at 141.

7. *Cf.* Kelsen, *supra* n. 1, at 347.

§5.02 GENERAL RULES AND DISCRETION

Due to the systematic structure of positive law, every legal act is only partly governed by a higher set of rules and, eventually, there always remains an undetermined sphere for the authorities' decision. With respect to administrative decisions in a specific situation, the authorities' freedom depends on the degree of determination contemplated by the applicable law. In some cases, the authorities may, according to the wording of a provision, have extensive latitude, whereas in another situation, the law precisely prescribes administrative conduct and leaves the authorities with little room to manoeuvre.

However, the concrete meaning of a legal provision cannot be derived only from the abstract wording of a rule. Rather, the interpretation of the wording can be the beginning of the process of determining a provision's concrete scope. Just because a rule is explicitly designed as a discretionary provision or uses vague legal concepts to govern administrative conduct, does not automatically lead to the result that, in a specific case, more than one solution is correct. Even if a provision – from an abstract point of view – gives the authorities wide leeway, it cannot be assumed that they generally enjoy that wide margin of discretion in every situation. Frequently, rules are deliberately drafted in a broad manner, so that the law can be applied to a wide range of different cases or new developments not explicitly foreseen by the legislator.⁸ Nevertheless, in a specific case, that does not mean that various legal interpretations are feasible, as a legal provision must always be exercised within the context of the law of which it forms a part. The fact that a rule – when considered in the abstract – seems to have a wide scope according to the letter of the law, does not mean that there always remains a broad range of possible outcomes.

For that reason, it is necessary to analyse a legal provision using all methods of interpretation. In that regard, the historic development of the law and assessments originally made by the legislator may provide indications as to how the law should be understood. Moreover, the purpose of the law must be taken into account and the meaning of a rule must be examined within its legal context, which means that all legal provisions, regardless of their level of detail, must be analysed from a teleological and systematic point of view. Most of the time, the scope of a provision that, at first glance, provides a wide margin of discretion will narrow down considerably in the course of the interpretation process.⁹ Finally, there will often remain only one or, at least, just a few possible solutions concerning the particular case at hand. As a result, the authorities, in the majority of the cases, will not be free to decide the case in their unfettered discretion, but rather constrained by the purpose of the provision and the legal context in which the applicable rule is embedded. Of course, in the case of an explicit discretionary grant or vague legal concepts, the range of possible outcomes may be broader when compared to more detailed provisions.

8. Bruno Peeters, *European Supervision on the Use of Vague and Undetermined Concepts in Tax Laws*, 22 EC Tax Rev. 112 (2013).

9. Wolfgang Gassner, *Ermessen im Steuerrecht – Referate und Diskussionsbeiträge* 51 (1970).

Having shown, from a general legal perspective, that discretion is a general legal phenomenon inherent in the legal system, but its actual scope depends on the particular level of law being applied in the context of a certain case, such discretionary power will now be examined in light of Article 107(1) TFEU. As the prerequisites for State aid (i.e., aid granted through State resources distorts the internal market) are fulfilled in most tax cases, the following analysis just focuses on the criterion of a selective advantage conferred on certain undertakings.

The first ECJ judgment dealing with authorities' discretionary power from a State aid perspective was delivered in a French case: *Kimberly Clark*.¹⁰ Under certain conditions, French labour law obliged undertakings laying off staff to draw up a social plan in order to reduce redundancies and to facilitate re-employment of those employees whose redundancy could not be avoided. In that regard, undertakings could negotiate agreements with the *Fonds National de l'Emploi* (FNE), which provided programs promoting alternatives to redundancy or training measures to improve redundant employees' chances in the labour market, which were, within defined limits, financed by the State.¹¹ The FNE, as the competent authority, enjoyed a rather wide margin of discretion to determine the concrete conditions of such agreements.¹² *Kimberly Clark*, a cellulose manufacturer that had to lay off staff in the course of a business restructuring program, concluded various agreements with the FNE. In a State aid procedure, the Commission classified the financial contribution made to *Kimberly Clark*'s social plan as prohibited State aid, but at the same time declared the measure as compatible with the internal market. Nevertheless, France appealed that decision, arguing, *inter alia*, that the whole mechanism that served as basis for the contribution did not constitute State aid, as it was a general measure open to all undertakings.¹³

In its decision, the ECJ first acknowledged that FNE intervention was neither restricted to certain categories of undertakings nor limited by sector or territory.¹⁴ However, the Court held that:

the FNE enjoys a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided.¹⁵

Consequently, the measure was considered as being 'liable to place certain undertakings in a more favourable situation than others and thus ... meet[s] the conditions for the classification as [State] aid'.¹⁶ Thus, the broad leeway granted to the FNE, potentially allowing it to treat certain undertakings beneficially, was sufficient to qualify the whole system as selective State aid.

10. *France v Commission* [hereinafter '*Kimberly Clark*'], C-241/94, Judgment, EU:C:1996:353.

11. *Cf. Kimberly Clark*, C-241/94, AG Opinion, EU:C:1996:195, para. 6 et seq.

12. *Cf. ibid.* para. 31.

13. *Cf. ibid.* para. 25.

14. *Kimberly Clark*, C-241/94, para. 22.

15. *Ibid.* para. 23.

16. *Ibid.* para. 24.

In two Italian cases, *Ecotrade*¹⁷ and *Piaggio*,¹⁸ the ECJ reviewed a law conferring discretionary power on the Minister of Industry to put insolvent industrial undertakings under extraordinary administration, thereby granting them special protection from the ordinary rules of insolvency. In order to fall under the scheme, insolvent companies had to have at least 300 employees and their debts to publicly-controlled bodies had to exceed a certain level.¹⁹ Consequently, the special regime was only applicable to large undertakings. Its rules included various derogations from the regular insolvency procedures, *inter alia*, granting undertakings under such administration a special suspension of tax and other public debts.²⁰ In both cases, the Court held that:

having regard to the class of undertakings covered by the legislation in issue and the scope of the discretion enjoyed by the minister ... that legislation meets the condition that it should relate to a specific undertaking, which is one of the defining features of State aid.²¹

From the Court's statement, it is not entirely clear whether the discretionary power together with the specific requirement restricting the scope of the law to 'large industrial undertakings in difficulties'²² caused the classification as State aid or if the discretionary power of the authorities, itself, would also have been enough to lead to that result. In his opinion regarding the *Ecotrade* case, Advocate General (AG) Fennelly located selectivity in the scheme at two levels. According to the AG, either the limited scope of the law restricting the special administration procedure or the discretionary power of the authorities would have separately led to the qualification of the measure as State aid.²³ Referring to *Kimberly Clark*, he opined:

Even if this discretion were not exercised, as it is in fact exercised, in respect of an already limited class of companies, it would leave a degree of latitude to the minister concerned which would be liable to place certain undertakings in a more favourable situation than others.²⁴

Consequently, the discretionary power would have been sufficient to classify the measure as State aid. As the Court also quoted its prior *Kimberly Clark* decision, it is also likely that in the absence of quantitative criteria, the measure would have been selective due to the wide discretionary margin granted to the Minister of Industry.²⁵

17. *Ecotrade*, C-200/97, Judgment, EU:C:1998:579.

18. *Piaggio*, C-295/97, Judgment, EU:C:1999:313.

19. *Ecotrade*, C-200/97, AG Opinion, EU:C:1998:378, para. 2.

20. Cf. *Piaggio*, C-295/97, para. 12 et seq.

21. *Ecotrade*, C-200/97, para. 40; *Piaggio*, C-295/97, para. 39.

22. *Piaggio*, C-295/97, para. 37.

23. *Ecotrade*, C-200/97, AG Opinion, EU:C:1998:378, para. 26.

24. *Ibid.* para. 28.

25. *Ecotrade*, C-200/97, para. 40.

In *Territorio Historico*,²⁶ the General Court²⁷ had to deal with State aid granted to Demesa, a refrigerator manufacturer, for establishing a plant in the Basque region. In addition to other grants stipulated in an agreement between Demesa and the Basque authorities, the undertaking received a tax credit provided in the general tax law.²⁸ In that regard the Basque tax law provided for a 45% tax credit for the cost of investment as long as the investment exceeded a certain minimum amount. In its underlying decision, the Commission had argued that the tax credit was selective due to the discretionary power of the authorities to determine the actual parameters of the tax credit and the minimum investment requirement stipulated in the law.²⁹ Regarding the authorities' latitude, the Court decided, with reference to *Kimberly Clark*, that by granting the tax authorities discretionary power, the provisions 'concerning the tax credit are liable to place certain undertakings in a more favourable situation than other.'³⁰ Thus, the discretionary power in applying the tax credit was sufficient to find the provision selective. In that regard, the Court rejected the applicants' argument that the authorities actually had no discretionary power and had to apply the tax credit uniformly and automatically to every undertaking satisfying the requirements prescribed by the law.³¹ Instead, the Court found that the Basque authorities had wide latitude in fixing the amount of the allowable investment and could lay down the specific conditions for the tax credit in each case.³² Interestingly, the Court did not even consider it important that, according to the Spanish constitution, the authorities could not apply the law in an arbitrary manner and were effectively obliged to grant the tax credit to every undertaking that fulfilled the requirement prescribed by the law.³³ In that context, the Court stated that it was not necessary for the tax authorities to have exercised their discretionary power in an arbitrary way; rather, it was sufficient that they could vary the amount used to calculate the tax benefit.³⁴ So, following the statements by the Court, the mere possibility that the tax authorities could put undertakings in a favourable position seems to be sufficient to find a provision selective, regardless of whether, in a particular case, a specific advantage was granted to an undertaking when compared to others falling within the scope of the law. Moreover, the Court confirmed the Commission's view that the minimum investment requirement, which limited the scope of the tax credit to large investments, was selective too. Therefore, the Basque provision was selective both because the authorities had a considerable margin of discretion in applying the tax credit and it included

26. *Territorio Historico de Álva*, Joined Cases T-127/99, T-129/99 and T-148/99, GC Judgment, EU:T:2002:59, para. 11.

27. The term 'General Court' used herein ('GC' in footnotes) refers either to the Court of First Instance or the General Court, as the case may be.

28. *Territorio Historico de Álva*, Joined Cases T-127/99, T-129/99 and T-148/99, para. 18.

29. *Ibid.* para. 145.

30. *Ibid.* para. 151.

31. *Ibid.* para. 148.

32. *Ibid.* para. 150.

33. Malte Strüber, *Steuerliche Beihilfen: Eine kritische Analyse der Anwendung des Beihilfeverbots im Bereich der direkten Steuern* 200 (2006).

34. *Territorio Historico de Álva*, Joined Cases T-127/99, T-129/99 and T-148/99, para. 154.

a minimum investment requirement restricting the scope of the tax credit to large investors.

In the Belgian *Maribel I* case,³⁵ which dealt with the reduction of social security contributions for certain economic sectors employing manual workers, the authorities' margin of discretion in decision-making did not lead to a finding of selectivity. In that case, the law only governed the general principles of the scheme, but the actual scope of the measure was regulated by Royal decrees. Here, the Court decided that the measure at stake could not be declared State aid just because the authorities had discretionary power regarding the application of specific social charge reductions, as the general principle prescribed by the law were further detailed in legally binding Royal Decrees that left the authorities no latitude in their eventual decision-making.³⁶ Nevertheless, in the end, the Belgian *Maribel* scheme was determined to be selective, since the advantages were just granted in specific economic sectors.³⁷

Lastly, the recent *P Oy* case,³⁸ concerning a Finnish loss deduction system, is of particular interest. The ECJ had to review a provision giving authorities latitude in granting taxpayers an exemption from a general prohibition of loss deduction in the case of a change in ownership in a company.³⁹ According to the Finnish provision, the tax authorities could, for special reasons in which it was necessary for the continuation of the activities of the company, authorize the deduction of losses.⁴⁰ In that case, the Court held that this discretionary provision could not generally be considered selective, as long as the authorities' scope of decision-making was limited by objective criteria related to the tax system 'such as the objective of avoiding trade in losses.'⁴¹ Nevertheless, the latitude provided by the provision could be qualified as selective if criteria unrelated to the tax system, such as the maintaining of employment, could be taken into account by the tax authorities.⁴² In that case, the Court explicitly referred to the possible administrative conduct under that provision, stating that the discretion granted to the authorities should not be regarded as selective if the authorities could only exercise their discretionary power in line with objectives inherent in the tax system and could not grant favourable treatment due to external parameters. Ultimately, the ECJ did not rule on the issue, due to its lack of information about the concrete scope of the discretionary provision under review.⁴³

The ECJ's case law tends to find provisions conferring a wide margin of discretionary power on authorities to be selective, since they enable authorities to put certain undertakings in a more favourable position than others. This tendency is understandable, as Member States could otherwise implement legal provisions that create an impression of being general in nature, but that, in practice, just serve as a

35. *Belgium v Commission ('Maribel I')*, C-75/97, Judgment, EU:C:1999:311, para. 12.

36. *Ibid.* para. 27.

37. *Ibid.* para. 32 et seq.

38. *P Oy*, C-6/12, Judgment, EU:C:2013:525.

39. *Ibid.* para. 16.

40. *Ibid.* para. 6.

41. *Ibid.* para. 26.

42. *Ibid.* para. 30.

43. *Ibid.* para. 31.

legal basis for the administration to grant a selective advantage.⁴⁴ However, if one generalizes the statements made by the Courts, the outcome could be excessive, as then every provision that grants leeway to authorities would have to be qualified as State aid, since there would always be a possibility that an advantage could be granted to certain undertakings.⁴⁵

As previously shown, discretion is a general phenomenon in every legal system. Therefore, provisions giving authorities broader latitude have to be interpreted – through more detailed rules, for example – in the context of the law and the specific circumstances of a case. Most of the time, the authorities' discretionary margin – which, from an abstract perspective, might seem to be relatively broad – narrows down considerably and often does not leave much room to manoeuvre to the authorities, as the law, as a whole, substantially predetermines the exercise of such discretionary power.⁴⁶ It would lead to odd results if every vague legal concept was qualified as selective just because, in the abstract, it confers a certain leeway on the authorities, potentially enabling them to put certain undertakings in a favourable position. For that reason, it cannot, in general, be derived from the case law that every provision conferring such leeway on the authorities in their decision-making automatically infringes Article 107(1) TFEU. In that context, the ECJ developed a more differentiated approach in *P Oy*,⁴⁷ by holding that discretionary power is not to be regarded as selective, if the authorities' leeway is limited by criteria related to objectives inherent in the tax regime.⁴⁸ In that case the Court explicitly accepted a certain discretionary margin in the authorities' decision-making, if the discretionary power is restricted to objectives inherent in the legal system. Therefore, it is no problem under State aid law, if a provision grants authorities a certain leeway in their decision-making, as long as that latitude stays within the systemic framework of the respective tax law. On the contrary, if a provision provides authorities with sufficient discretion to enable them to

44. Michael Lang, *Die Auswirkungen des gemeinschaftsrechtlichen Beihilferechts auf das Steuerrecht* 48 (2009).

45. Franz Philipp Sutter, *Das EG-Beihilfenverbot und sein Durchführungsverbot in Steuersachen* 62 (2005).

46. Cf. Lang, *supra* n. 44, at 48.

47. *P Oy*, C-6/12.

48. It will be quite difficult to determine the objectives inherent in a tax system. But, regarding this judgment, the Court seems to focus on technical mechanisms, which are necessary for the proper functioning of a tax system. In the case at hand, an exemption from the general loss deduction prohibition in the case of a change in ownership of a company was at stake. Here, the Court seems to allow for a grant of discretionary power to tax authorities in so far as it is in line with the general goal of the loss deduction prohibition, namely to prevent loss trading. So, if authorities only have the power to evaluate a case under the premise of preventing loss trading, it should not be considered selective. This could, for example, be the case if a company having a considerable amount of loss carry-forwards is acquired by an investor who wants to pursue the business already conducted by the company. Whereas, in a case where, after the acquisition the original business activity is terminated and the company is now used to run another business, the situation would be different if the company could keep the losses due to the mere fact that it employs about the same number of staff. In such a situation, the leeway of the authority may be classified as selective, as here the approval would be given for the objective of maintaining employment and not just because of considerations of preventing loss trading.

treat undertakings favourably based on criteria unrelated to the law, such as maintenance of employment, it must be considered selective.⁴⁹ This position is perfectly in line with the ECJ's general case law regarding selectivity, where the Court rejects justifications for selective measures for external goals (e.g., environmental protection).⁵⁰

Taking all that into account, only provisions with an indefinite scope, not giving guidance to the tax authorities and, thus, enabling them to put certain undertakings in favourable situations for reasons unrelated to the tax system, should be classified as State aid. Here, the recent cases *SIAT*⁵¹ and *Itelcar*,⁵² which finally introduce the concept of legal certainty as a fundamental principle of EU tax law,⁵³ have to be mentioned.⁵⁴ If a general, non-selective provision is 'clear, precise and predictable'⁵⁵ regarding its effects and, therefore, suits the principle of legal certainty set out by the Court, it will not be considered State aid under Article 107(1) TFEU.⁵⁶ Because, under such a rule, the authorities' margin of discretion is sufficiently predetermined that no room for substantially different treatment in comparable situations is left. In that context, selectivity should only be assumed if authorities have room to confer a selective advantage on a specific taxpayer in the course of their administrative conduct.⁵⁷

§5.03 INDIVIDUAL DECISIONS AND DISCRETION

The question is, now, under which circumstances administrative conduct must be qualified as State aid. The main issue in that regard is how to determine the selectivity of an administrative practice based on a general, non-selective rule. Unfortunately, in tax law, this is often not straightforward; due to a lack of case law, the ECJ has not yet developed specific guidelines for the review of individual acts as it has in other fields (such as, for instance, the private investor test for a capital contribution by a State in a certain undertaking⁵⁸). Only in the case of a waiver or deferral of existing tax claims, has the ECJ offered a rather clear standard, adjusting the private investor test to a so-called private creditor test.⁵⁹ Accordingly, tax authorities are obliged to act like a creditor under market conditions: they must charge a certain amount of interest for

49. *P Oy*, C-6/12, para. 27.

50. Cf. *British Aggregates v Commission*, C-487/06 P, Judgment, EU:C:2008:757, para. 92.

51. *SIAT*, C-318/10, Judgment, EU:C:2012:415.

52. *Itelcar*, C-282/12, Judgment, EU:C:2013:629.

53. Cf. *Gebroedes van Es*, C-143/93, Judgment, EU:C:1996:45, para. 27.

54. *SIAT*, C-318/10, paras 58–59; *Itelcar*, C-282/12, para. 44.

55. *SIAT*, C-318/10, para. 58 (emphasis added).

56. For a general remark on vague and undetermined legal concepts, see Bruno Peeters, *European Supervision on the Use of Vague and Undetermined Concepts in Tax Laws*, 22 EC Tax Rev. 112 (2013).

57. See §5.03, *infra*, for a detailed discussion regarding the assessment administrative practice conferring a selective advantage on a certain taxpayer.

58. Helmuth Cremer, *Article 107, paragraph 11, in EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (Christian Callies and Matthias Ruffert eds., 4th ed. 2011).

59. *DMT*, C-256/97, Judgment, EU:C:1999:332, para. 25.

outstanding debts and, if the debtor is not able to settle the amount and the future prospect for the business is negative, they must initiate insolvency procedures.⁶⁰ Moreover, settled Commission practice makes clear that the persistent non-collection of outstanding tax claims is State aid under Article 107(1) TFEU.⁶¹

The State aid assessment, however, becomes more difficult regarding an allegedly selective calculation of the actual tax burden. In that respect, various questions arise from the evaluation of Member States' presumably beneficial administrative practices. First of all, cases in which the authorities exceed their predetermined margin of discretion, leading to a lower tax burden for specific undertakings when compared to similar situations where the law is correctly applied, should be considered. Such an administrative practice obviously treats taxpayers in comparable legal and factual situations differently. Therefore, the beneficial administrative conduct through misapplication of the law should be qualified as prohibited State aid. The current Commission practice also seems to tend toward that direction. In its notice concerning the application of State aid rules regarding business taxation, the Commission stated that an administrative practice 'that departs from the general tax rule to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail.'⁶² In a published draft notice regarding the interpretation of Article 107(1) TFEU, the Commission got even more explicit by saying that it will consider settlements between tax authorities and certain taxpayers 'contrary to the applicable tax provision' that result in a lower tax burden to be a selective advantage.⁶³

Such a position, however, could probably raise criticism, as it could be argued that it introduces an external review mechanism for domestic decisions beside the regular, domestic chain of appeal. But, from an effect-based State aid perspective, where every form of aid granted through State resources is prohibited, it has to be kept in mind that neither the authorities granting a benefit through an unlawful decision nor the favourably-treated undertaking would likely appeal the unlawful decision. Therefore, it would contradict the fundamental goal of State aid law, if a beneficial treatment generated by disregarding national law could not be investigated, only due to the argument, that in such a procedure, questions of domestic law would have to be examined.

In that regard, too, a situation is conceivable where the law is generally ignored and all relevant taxpayers are treated favourably by breaking the law. This could, for instance, be the case if an administrative circular indicates the common non-application of a burdensome provision and, as a result, all undertakings that would normally fall under the provision benefit from that illegal practice. Due to the general

60. Commission Decision 2003/283/EC of 27 Nov. 2002, *Refractarios Especiales*, OJ L 108/21 (2003).

61. Commission Decision 1999/509/EC of 14 Oct. 1998, *Magefesa*, OJ L 198/15 (1999); Commission Decision 2002/935/EC of 14 May 2002, *Empresas Álvarez*, OJ L 329/1 (2002), para. 51 et seq.

62. Commission Notice on the Application of State Aid Rules to Measures of Direct Business Taxation, OJ L 23/14 (1998) [hereinafter 'State Aid Direct Business Taxation Notice'], para. 22.

63. 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/draft_guidance_en.pdf, para. 173 (accessed 23 Mar. 2017) [hereinafter 'Draft Notion of State Aid Notice'].

nature of the measure, such administrative conduct could not be seen as selective, as all taxpayers receive privileged treatment vis-à-vis the relevant provision.

However, it could be argued that, by assessing the selectivity of such a measure, not only must the actual treatment of taxpayers regarding the specific provision be evaluated, but also the unlawful administrative practice must be compared to the situation of other taxpayers who are covered under other rules and are treated in line with the law. Following that view, the general misapplication of the law in favour of all relevant taxpayers would lead to State aid. But, it must be emphasized that the other tax rules, which are applied correctly, have a different scope and do not lead to the same legal effects as the misapplied norm. Moreover, EU law is generally neutral regarding the legal quality of domestic provisions: the national legislator cannot defend a certain norm based on the argument that a law was enacted by subordinate local authorities. Therefore, from an EU law perspective, it should also not make a difference if certain rules are enacted by the legislator in the form of a general law or by an administrative regulation.⁶⁴ The degree of abstraction between a general law and a regulation is not different in principle. From an effect-based point of view, it remains at least doubtful that a beneficial-but-general administrative circular should be treated differently in comparison to a regulation.⁶⁵ In the end, if the view that a general misapplication of law should not be seen as State aid is accepted, an odd situation would remain: the more persistently a national law is broken, the greater the chance that there is no violation of State aid rules.

If a legal provision leaves the authorities a certain leeway in their decision making, then it can be assumed that every decision staying within the framework contemplated by the law is in line with State aid law. In that respect, the personal intention of the authorities is irrelevant; for State aid purposes, only the effect of a certain measure is relevant.⁶⁶ Consequently, if the tax authorities deliberately interpret the law in favour of a certain taxpayer, but stay within the discretion established by the applicable law, no selective advantage is conferred on the taxpayer, since the non-selective rule is applied correctly. Actually, if a certain provision really would enable the authorities to treat taxpayers in comparable situations substantially differently, such a rule might itself contain a selective element.

In that context, it should be pointed out that the latitude of the authorities can change over time, even if a specific legal provision remains unchanged. By nature, law is a living organism and can be subject to changes. The meaning of a law may evolve, for instance, due to supreme court decisions to which authorities are bound. If a court's judgment now holds a certain legal interpretation previously used by the authorities does not comport with the law the authorities' ability to exercise its discretion is thereby reduced and their prior decisions following that wrong line of reasoning have

64. In that context, the term 'regulation' meant an abstract, legally binding administrative act.

65. Cf. Michael Lang, *Die gesetzwidrige Begünstigung von Steuerpflichtigen als gemeinschaftsrechtswidrige Beihilfe in Ertragsteuern in Wissenschaft und Praxis*, in *Festschrift Doralt* 242 (Reinhold Beiser et al. eds, 2007).

66. Cf. *British Aggregates v Commission*, C-487/06 P, para. 85; see also Lang, *supra*, n. 44, at 23; for a critical view, see Wolfgang Schön, *Taxation and State Aid Law in the European Union*, 36 *Common Mkt L. Rev.* 23 (1999).

to be considered incorrect in light of the new case law. A decision must remain compatible with State aid law during its whole period of its application. Here, the question arises if earlier decisions according to which taxes are still to be paid, but which cannot be contested due to procedural rules, must also be revised because of EU State aid law. State aid law could, therefore, lead to the consequence that a Member State's domestic procedural laws would have to incorporate rules allowing for an amendment of such final administrative decisions.

A problem could also arise in jurisdictions where supreme court decisions do not generally have a legally binding effect for the authorities and are just relevant for the individual case before the court. For that reason, the authorities principally could deviate from the court's assessment and decide a case based on a different legal interpretation in order to 'provoke' another judgment. This gives the court the opportunity to review its prior decision and possibly change its legal opinion. If a favourable deviation from the case law would be automatically considered as State aid an important tool for reviewing legal decisions could possibly be removed in certain jurisdictions.

Moreover, State aid law could lead to the consequence that tax authorities are, to a certain extent, bound by their own decisions. Even if authorities have a certain amount of room to manoeuvre in applying the law, any deviation from a prior assessment should be based on a proper justification. For that reason, if the authorities have interpreted the law in a certain way in one year, it should not be possible for them to change the assessment for the benefit of a taxpayer in the following year without sound reasons. The same would be true if authorities have to make decisions regarding different taxpayers. In comparable situations, the tax authorities should not be able to come to substantially different conclusions. Otherwise, prohibited State aid could be assumed with regard to the favoured company. Since State aid law is principally neutral regarding domestic competence rules, one could even argue for a legally binding effect of administrative decisions of different branches of the tax administration. If, for example, Tax Authority A has decided a case following a specific line of argumentation, Tax Authority B, responsible for another region, should not deviate from the view previously taken by Tax Authority A.

However, having regard to the ECJ case law concerning regional selectivity, a more differentiated evaluation may be appropriate to assess the possible, legally binding effect of administrative decisions in order to determine the selectivity of favourable administrative conduct.⁶⁷ Following the requirements developed by AG Geelhoed⁶⁸ and subsequently applied by the ECJ, a favourable tax measure only applicable in a specific region should not be regarded as selective, if a regional authority enacts the measure is sufficiently autonomous.⁶⁹ According to the ECJ's case law, the autonomy of regional authorities is sufficient and a favourable tax measure

67. *Portugal v Commission*, C-88/03, Judgment, EU:C:2006:511; *UGT Rioja*, Joined Cases C-428 to 434/06, Judgment, EU:C:2008:488, para. 51.

68. *Portugal v Commission*, C-88/03, AG Opinion, EU:C:2005:618, para. 54.

69. Cf. Michael Lang, *Beschlussrechtsabgaben der Gemeinden als regional selektive Beihilfen in Theorie und Praxis des Wirtschaftsrechts*, in FS H. Rene Laurer 521 (Clemens Jabloner et al. eds, 2009).

will not, therefore, raise an issue under Article 107(1) TFEU, if it is institutionally, procedurally and economically autonomous from a central government.⁷⁰ The condition of institutional autonomy requires that the local authority – from a constitutional point of view – has a political and administrative status separate from that of the central government.⁷¹ Hence, the local body must be formally separated from the central organization. Moreover, under the requirement of procedural autonomy, the central government must not be able to directly intervene as regards the content of a certain tax measure, which means that the local authority can exercise its powers regardless of the conduct of the central authority.⁷² But, in that context, it does not harm the autonomy of a local authority if it has to comply with certain conditions set out centrally, such as restrictions on a constitutional level.⁷³ This is even true if an act of the local authority can be reviewed by a national court, as long as the jurisdiction of the court is limited to deciding about compliance with constitutional requirements. Moreover, a conciliation or coordination mechanism in order to avoid conflicts between the local and central authorities does not, itself, lead to the consequence that the local authority is not considered as procedurally autonomous. In essence, to meet the requirement of procedural autonomy, the local body has to have the competence to adopt tax measures independently without direct interference from the central government on its actual content.⁷⁴ Finally, the local authority has to bear the financial consequences of its tax rules, in order to be qualified as economically autonomous. Consequently, any decrease in the tax income may not be offset or subsidized by the central body. However, financial transfers between a State's entities can have various reasons. According to AG Kokott, two requirements must be fulfilled to establish a connection between local tax legislation and a financial transfer:

First of all, the level of the local tax revenue must be included as a parameter in determining any financial transfer. Secondly, a reduction in tax revenue must also lead to a corresponding compensatory adjustment in the transfer of funds between the State levels.⁷⁵

In *UGT Rioja*, the ECJ looked for a causal relationship between a tax measure adopted by the local authority and the financial compensation from the central level.⁷⁶ As an individual favourable administrative decision and financial transfers between the central and local authority will hardly be related directly, an assessment whether there is a binding effect of administrative decisions between different local tax authorities should just focus on the requirements of institutional and procedural autonomy.

By applying the conditions as set out by the ECJ, a favourable decision deviating from the prior practice of another branch of the tax authorities should not be qualified

70. *Portugal v Commission*, C-88/03, para. 67; *UGT Rioja*, Joined Cases C-428 to 434/06, para. 51.

71. *Portugal v Commission* C-88/03, para. 67.

72. *Ibid.* para. 68.

73. *UGT Rioja*, Joined Cases C-428 to 434/06, AG Opinion, EU:C:2008:262, para. 88 et seq.

74. *UGT Rioja*, C-428 to 434/06, para. 107; cf. *UGT Rioja*, C-428 to 434/06, AG Opinion, para. 97.

75. *UGT Rioja*, C-428 to 434/06, AG Opinion, para. 110.

76. *UGT Rioja*, C-428 to 434/06, para. 129.

as selective, if the local authority is, first of all, formally separate from any central organization and, therefore, has its own constitutional, political, and administrative status. Moreover, another constitutionally separate body must not have the ability to directly intervene in the authority's decision-making process. Hence, if the central government can directly instruct a local authority on how it has to proceed in a specific matter, the local authority will not be found to be sufficiently autonomous. However, if there is no possibility for intervention and the local administrative body is constitutionally and politically separate from the central organization, autonomy can be assumed and the administrative decisions of other tax authorities will not have a binding effect on the local authority. In such case, differing decisions of different tax authorities in different regions of a Member State are acceptable under State aid rules.

§5.04 TAX RULINGS

Tax rulings, although recently drawing scrutiny from the Commission, are useful instruments to enhance the predictability of administrative decisions. In general, rulings can considerably contribute to legal certainty, as complex questions arising in practice are resolved in advance and, consequently, subsequent tax disputes are avoided. A ruling mechanism enables authorities to assess a certain case prior to its actual realization and binds them to a certain legal evaluation with regard to that specific situation. Therefore, the taxpayer has, in advance, information about the way the authorities will actually apply the law and can already take account of the authorities' assessments when planning its business activities. Often, rulings can compensate for some of the uncertainties described above and can provide more certainty.

Some jurisdictions explicitly provide a formal ruling procedure, others do not. Under State aid law, it should be irrelevant in which form a ruling is rendered to a taxpayer. It does not make any difference whether such an interpretation is provided to the taxpayer in an informal procedure, maybe just protected by good faith, or in a formal ruling mechanism resulting in a legally binding act. The only relevant question under Article 107(1) TFEU is whether some undertakings are treated more favourably than others in comparable legal and factual situations. So, if an administrative decision stays within the discretionary margin prescribed by the law, it cannot be assumed that a selective advantage was granted to a taxpayer. Of course, an informal decision-making process may give rise to suspicions about whether the authorities stay within their room to manoeuvre.⁷⁷ Therefore, at least in complex cases where the margin in decision-making for the tax authorities is rather broad, it might be useful to implement a formal ruling procedure consisting of clear requirements in order to achieve a proper assessment of difficult legal questions.

The fact that tax rulings are not published should not raise any issues under State aid law, as normal tax assessments are also not usually published in most of the countries. The situation would only be different if one assumes a competitor's right to

77. State Aid Direct Business Taxation Notice, *supra* n. 62, para. 22.

obtain information regarding the tax situation in order to initiate competitor claims based on State aid law.⁷⁸ However, this would then be an issue of general importance and would affect other administrative decisions, too.

In order to avoid an infringement of State aid law, a tax ruling procedure should not, itself, be selective. Consequently, the advantage of legal certainty should be available for all undertakings in comparable legal and factual situations.⁷⁹ As long as enterprises that are in comparable situations have access to the ruling regime, there should not be any State aid issue.

In conclusion, rulings can only raise problems under State aid law if a selective tax advantage is conferred on a certain undertaking. This could be the case when the law is misapplied or that authorities acting within their margin of discretion treat taxpayers in comparable situations substantially differently.⁸⁰ But, as shown above, this is not an issue particularly limited to rulings, as usual tax assessments conducted in such a manner would also be qualified as illegal State aid.

§5.05 CONCLUSION

As shown at the beginning, discretionary power of tax authorities is a general phenomenon inherent in the structure of a legal system. Depending on the actual scope of a legal provision, authorities have a certain leeway in their decision-making that they have to fill with their own values. But, the letter of the law is just the starting point for any attempt to determine the actual leeway the authorities enjoy in a specific case. To interpret the rule, teleological and systemic arguments have to be considered, as a rule only can be interpreted within the systemic framework of which it forms a part. In most cases, an allegedly wide latitude will narrow down considerably due to a thorough analysis of the concrete meaning of a legal provision. Therefore, even in the context of a discretionary provision or vague legal concepts, the authorities will not be free to decide a case in their unfettered discretion.

The ECJ already had to rule several times on provisions conferring discretionary power to authorities. The Court has qualified provisions granting a wide margin of discretion to the authorities, potentially enabling them to put certain undertakings in a favourable situation, as selective.⁸¹ This qualification prevents Member States from implementing legal provisions that create the impression of being of general in nature, while in practice just serve as a legal basis for the administration to grant selective advantages.⁸² However, if one would generalize the statements by the Courts, the outcome could be excessive, as then every provision that grants leeway to the authorities would have to be qualified as State aid, since there would always be a possibility that an advantage could be granted to certain undertakings. Taking into account that discretion is inherent in every legal decision, a legal provision that is not

78. Cf. Lang, *supra* n. 44, at 105 et seq.

79. Draft Notion of State Aid Notice, *supra* n. 63, para. 177.

80. Cf. Raymond Luja, *EU State Aid Rules and Their Limits*, 76 Tax Notes Int'l, 353, 354 (2014).

81. Kimberly Clark, C-241/94, para. 23.

82. Lang, *supra*, n. 44, at 48.

selective, but grants a certain leeway to the authorities, should not generally be qualified as prohibited State aid. In its *P Oy* decision,⁸³ the Court held that a discretionary provision should not be regarded as selective as long as the degree of latitude is limited to criteria related to the respective tax regime. Therefore, as long as the authorities' leeway under a certain provision stays within the systemic framework of the respective tax law, no issues should be raised under State aid law. However, a rule granting authorities broad discretion (e.g., allowing them to also treat undertakings beneficially based on criteria unrelated to tax law) must be considered as selective.

Individual administrative decisions based on general provisions should be regarded as selective if the law is misapplied in favour of certain taxpayers. In such situations, taxpayers clearly receive an advantage compared to situations where the law is enforced correctly. Only when the law is principally disregarded and all taxpayers receive favourable treatment regarding a specific provision, can administrative conduct be considered in line with State aid law. However, when assessing the selectivity of such a measure, one could argue for an extensive comparability assessment, by generally comparing the unlawful application of the law to the situation of taxpayer treated in accordance with the law.

Administrative practices staying within the framework predetermined by the law may be considered in line with State aid law. Usually, under a general rule clearly defining the administrative conduct, no substantially favourable treatment of certain taxpayers should be possible. Moreover, it has to be taken into account that the authorities' leeway can narrow in the course of the time, particularly due to changes in case law. Regarding tax rulings, the situation is not different. As long as rulings apply the law properly and do not confer a selective advantage by lowering the tax burden of a certain undertaking, they should not raise any State aid issues. However, ruling procedures only available for certain groups of undertakings might infringe State aid laws, as only these particular undertakings could obtain the benefit of enhanced legal certainty conferred by a ruling determining administrative conduct in advance.

83. *P Oy*, C-6/12, para. 26.