Outsourcing in Taxation: Lessons from a Belgian Case Study on Road Charging

*Elly Van de Velde**

Councillor of State
Professor of Tax Law, Tax & Business Unit CORe UHasselt

Niels Appermont

Associate Professor of Economic Law, Tax & Business Unit CORe UHasselt

Madou Haberkorn

Researcher Law, Tax & Business Unit CORe UHasselt

Luc De Broe is steeds een gewaardeerde academische collega geweest, die zijn academische activiteiten vlot wist te koppelen aan zijn bijzonder ruime ervaring in de fiscale praktijk. Luc schreef steeds met een gezaghebbende stem over een ruim scala aan thema's binnen de Belgische, Europese en internationale fiscaliteit. In zijn publicaties wist Luc steeds een mooie brug te slaan tussen het Europees (fiscaal) recht, het intern fiscaal recht en de fiscaal-juridische praktijk. Het leek ons dan ook gepast om voor zijn Liber Amicorum een bijdrage te schrijven die aansluit bij deze filosofie.

Introduction

To effectively combat road externalities, the OECD advised Belgium to expand the current scope of road pricing for heavy-goods vehicles to include passenger motorised vehicles. However, the complexity of the current legal framework of the Belgian 'distance charge' is alarming and raises myriad questions regarding

* Views expressed in this contribution are personal views of the author and do not reflect the view of the organisation.

the legal protection of the taxpayer. This contribution investigates the manner in which road charging is implemented in the Flanders Region as an example of 'outsourcing in taxation', while focusing on the legal protection of the taxpayer. As a result of far-reaching outsourcing of the taxation process to private undertakings, the Flemish tax administration is left with little or no control over the process of taxation. This situation diminishes the level of legal protection of the taxpayer, especially when compared to the default position of the taxpayer *vis-à-vis* the tax administration in case of no such outsourcing. Before expanding the scope of this tax to include personal motorised vehicles, a reform of the legal framework is recommended.[1]

1. The Belgian road charge and the concept of 'outsourcing in taxation': questions and bottlenecks

The Belgian road charge for heavy-goods vehicles was introduced on 1 January 2016, replacing the so-called 'Eurovignette'. This charge constitutes a fee for the use of a road network by heavy-goods vehicles. These mechanisms implement the European 'polluter pays' and 'user pays' principles as set out in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU) and Directive 1999/62/EC on the Charging of Vehicles for the Use of Road Infrastructures.[2]

In Belgium, this road charge was implemented by the regional governments (Flemish Region, Walloon Region and the Brussels Capital Region) on the basis of an Interregional Cooperation Agreement of 31 January 2014.[3] While the Walloon Region decided to implement the road charge as a 'retribution' (i.e., a (forced) payment for a service provided by a public actor), the Flemish and Brussels Capital Regions implemented the road charge as a tax. For the Flemish Region, relevant legal provisions were inserted in the Flemish Tax Code (Art. 2.4.1.0.1. *ff*). At first sight, the Flemish 'kilometre tax' may seem like an innocuous tax. According to the annual report of the Flemish Tax Administration (VLABEL) and the Flemish Minister of Finance, the total revenue of the Flemish Kilometre Tax ('FKT') was

1. This contribution builds upon our earlier publications written within the framework of the FWO Research Project G0C5221N "Taxpayer or Customer? An inductive inquiry into 'fiscal outsourcing' to private service providers on the basis of the Belgian distance charge".
2. Art. 191(2) TFEU, *OJEU* C326/133; Directive 1999/62/EC, on the charging of heavy-goods vehicles for the use of certain infrastructures, 17 June 1999.
3. Cooperation Agreement of 31 January 2014 between the Flemish Region, the Walloon Region and the Brussels Capital Region concerning the introduction of a road charge on the territory of the three regions, *Belgian Official Gazette* 14 May 2014.

565 euro million in 2023, excluding 19 million euro in fines imposed by the tax administration for non-compliance.[4]

Yet, appearances can be deceiving. The FKT is no mere 'toll', but an actual tax and thus, in principle, subject to the common legal framework for all taxes under the Flemish Tax Code. The FKT operates on the basis of a complex system that features a far-reaching 'outsourcing' of several key aspects of the taxation process to private service providers. In a nutshell, the road charge operates based on a tripartite relationship. To drive heavy-goods vehicles on certain roads, the taxpayer (i.e., the owner of the vehicle) must conclude a contractual agreement with a recognised private service provider to obtain an 'on-board unit'. This on-board unit will register the distance driven on certain roads, allowing the service provider to invoice the taxpayer. The service providers themselves are obliged to pass on the tax to the government on the basis of their own legal relationship with the government. Taxpayers will normally not come into direct contact with VLABEL unless in the case of non-compliance; for example, when the taxpayer has not entered into a valid contract with a service provider, or in the case of the use of a heavy-goods vehicle when such a contract is suspended. VLABEL can then fine the taxpayer directly.

In its 2016, 2017 and 2018 annual reports, the Flemish Ombuds Service indicated that there is a concern regarding the legal protection of taxpayers subjected to the FKT.[5] The root of this concern is this outsourcing mechanism. This means that the taxpayer who must pay the distance charge is no longer exclusively in a direct relationship with VLABEL but is also in a contractual relationship with a private service provider to be chosen from a closed list of service providers recognised by the government.

Regarding the legal protection of the taxpayer, the proof of the pudding is in the eating. As long as everything goes well and the taxpayer complies, questions on legal protection might not come prominently into view. However, when the taxpayer seeks to challenge the (amount of) tax, he is confronted with questions or uncertainties or when the legal relationship becomes troubled, the lack of an accessible, clear and coherent legal framework may strongly diminish the taxpayer's overall level of legal protection.

4. VLABEL, *Annual Report* 2023, 8; *Report of the Committee of the Flemish Parliament on General Policy*, *Finance*, *Budget and Justice*, 5 March 2024, www.vlaamsparlement.be/nl/parlementair-werk/commissies/commissievergaderingen/1806232/verslag/1809707.

5. Flemish Ombuds Service, *Annual Report* 2016-2017, Brussels, 2016, 8-11; Flemish Ombuds Service, Annual Report 2017-2018, Brussels, 2017, 37; Flemish Ombuds Service, *Annual Report* 2018-2019, Brussels 2018, 14-15.

With the prospect of the introduction of a road charge for passenger motorised vehicles[6] an examination of the legal framework is all the more pressing, especially because such a tax would target individual taxpayers, who can be expected to be less organised and sophisticated than the taxpayers who are targeted by the current road charge framework and usually act in a professional capacity. In Flanders, numerous preparatory studies have been made to anticipate the effects of a similar road charge for passenger motorised vehicles[7], including an extensive study from a legal and tax perspective.[8] Apart from stating that the legal protection of the taxpayer remains a point of attention, this matter is not further explored.[9] The Brussels Capital Region has also laid out concrete plans to introduce a road charge for passenger vehicles, which may also function partially with an outsourcing mechanism.[10]

Today, in many countries, and certainly in Belgium,[11] key elements of the taxation process, such as the determination of the taxable event, the determination of tax base, the calculation of the amount of tax and the collection and recovery of the tax are normally deemed to be classic governmental prerogatives (*infra*, section 2.4).

Viewed from a broader perspective, 'tax farming' and the private collection of tax have a long and complicated history, and the literature points – often in an unfavourable manner – to many instances where taxes were collected by private entities, such as the *societas publicanorum* in ancient Rome[12], in medieval France

6. Departement Mobiliteit en openbare werken, *Uitrol van een systeem van wegenheffing*, 2019, https://assets.vlaanderen.be/image/upload/v1590770991/VR-2019-1312-studie-wegenheffing-visienota_cwhz0d.pdf.
7. www.vlaanderen.be/kilometerheffing-voor-personenwagens.
8. Available at https://assets.vlaanderen.be/image/upload/v1590770990/VR-2019-1312-studie-wegenheffing-juridisch-fiscale-analyse_sncxth.pdf.
9. Departement Mobiliteit en Openbare Werken, *Uitrol van een systeem van wegenheffing*, https://assets.vlaanderen.be/image/upload/v1590770990/VR-2019-1312-studie-wegenheffing-juridisch-fiscale-analyse_sncxth.pdf, 92, fn. 352.
10. R. VAN CLEEMPUT, "De Brusselse slimme kilometerheffing: opportuniteiten, obstakels en publiekrechtelijke aspecten", *Milieu en Energierecht* 2021, issue 21, 279-292.
11. P. VAN ORSHOVEN, "De fiscale bevoegdheid van de Vlaamse Gemeenschap en het Vlaamse Gewest" in K. DEKETELAERE (ed.), *Vlaamse Fiscaliteit. Status quaestionis* 1997, Bruges, die Keure, 1997, 6.
12. See, for example, E. BADIAN, *Publicans and Sinners. Private Enterprise in the Service of the Roman Republic*, Oxford, Basil Blackwell, 1972, 170 p.; J.R. LOVE, *Antiquity and Capitalism. Max Weber and the Sociological Foundations of Roman Civilization*, London, Routledge, 1991, 174-208; E. KISER and D. KANE, "The Perils of Privatisation: How the Characteristics of Principals Affected Tax Farming in the Roman Republic and Empire", *Social Science History* 2007, vol. 31, issue 2, 191-212; W. MAGNUSON, *For Profit: A History of Corporations*, New York, Basic Books, 2022, 20-40; O.

and England[13], in the Dutch Republic and the East India Company in the seventeenth and eighteenth century[14], in eighteenth-century France[15], and in late nineteenth-century Germany[16].

The purpose of the current research is to investigate the FKT as an example of outsourcing in taxation within a broader European legal framework, to determine the (preliminary) effects of this outsourcing mechanism on the legal protection of the taxpayer.

In doing so, our aim is not to pass any legal or moral judgement on the phenomenon of outsourcing in taxation, but to provide an example of the possible effects of 'tax outsourcing' on the legal protection of the taxpayer, allowing other jurisdictions to learn from the Flemish experience. This contribution should therefore not be construed as objecting to the outsourcing of (elements of) the process of taxation *per se*.

Considering the foregoing, the fundamental question arises as to whether the taxpayer enjoys an equivalent level of legal protection with regard to the collection of the FKT, as with taxes collected directly by VLABEL according to the traditional collection methods. Therefore, we will assess the legal protection of the taxpayer against the default level of legal protection in their relationship with the tax authorities in Belgium.

This contribution is also relevant for persons and entities established outside Belgium, as the FKT is also owed by taxpayers not established in Flanders or Belgium, but who make use of public roads in the Flemish Region.

The remainder of this contribution is structured as follows. Firstly, the FKT will be placed in its broader context. Secondly, the complex organisation of the FKT will be presented, which, thirdly, allows to assess its impact on the legal protection of the taxpayer in Belgium.

GUTTIÉREZ, M. MARTÍNEZ-ESTELLER, "Tax Collection in the Roman Empire: A new institutional economics approach", *Constitutional Political Economy* 2022, vol. 33, 378-401.

13. N.D. JOHNSON and M. KOYAMA, "Tax Farming and the Origins of State Capacity in England and France", *Explorations in Economic History* 2014, vol. 51, 1-20.
14. D. KRAAL and J. KASIPILLAI, "The Dutch East India Company's tax farming in 18th century Malacca", *e-Journal of Tax Research* 2014, vol. 12, 253-281.
15. E.N. WHITE, "From Privatized to government-administered tax collection: tax farming in eighteenth-century France", *Economic History Review* 2004, vol. 57, 636-663.
16. F. KNIEP, *Societas Publicanorum*, I, Jena, Gustav Fischer Verlag, 1896, 92. Interestingly, the German example at the time included road taxes.

2. FKT: Legal context

2.1. *European legal context*

The issue of road charging and its possible contribution to more sustainable transport has been recognised for some time by the EU. Evidence suggested that there was a significant mismatch between the prices paid for individual transport and the actual overall costs.[17] The Eurovignette was initially proposed by the European Commission in 1999, based on a 1995 green paper.[18] This led to the adoption of Directive 1999/62/EC on the charging of heavy-goods vehicles for the use of certain infrastructure.[19] It was most recently amended in 2022, by Directive (EU) 2022/362.[20]

Through this directive, the EU has consistently supported the application of the 'polluter pays' and 'user pays' principles, which promote a financial and environmentally sustainable and socially equitable road transport.[21]

To facilitate access to markets for new tolling service providers and to reduce the overall system costs, the European Commission set forth certain standards regarding interoperable electronic tolling systems in the EU. The EU legal framework for electronic toll collection (ETC) today consists of two additional legal instruments: (i) Directive (EU) 2019/520 on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the union;[22] and (ii) Commission Implementing Regulation (EU) 2020/204.[23] This way, the EU aims to create a European Electronic Toll Service (EETS) that allows road users to meet their charging obligations in all the European Member States by means

17. B. DE BORGER and S. PROOST, "Tax and regulatory policies for European transport: getting there but in the slow lane" in I. PARRY, K. PITTEL and H. VOLLEBERGH (eds.), *Energy Tax and Regulatory Policy in Europe: Reform Priorities*, Cambridge, MA, MIT Press, 2017, 259-296.
18. COM(94)659, For a European Union Energy Policy – Green paper, 23 February 1995.
19. Directive No. 1999/62/EC, on the charging of heavy-goods vehicles for the use of certain infrastructures, 17 June 1999.
20. Directive (EU) No. 2022/362, 24 February 2022 amending Directives 1999/62/EC, 1999/37/EC and (EU) 2019/520, as regards the charging of vehicles for the use of certain infrastructures.
21. Consideration 47 of Directive 1999/62/EC, as amended.
22. Directive (EU) No. 2019/520 of the European Parliament and of the Council, 19 March 2019 on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the Union (recast), replacing 2004/52/EC on the interoperability of electronic road toll systems.
23. Commission Implementing Regulation (EU) No. 2020/204, 28 November 2019 on detailed obligations of European Electronic Toll Service providers, minimum content of the European Electronic Toll Service domain statement, electronic interfaces, requirements for interoperability constituents and repealing Decision 2009/750/EC.

of a single electronic registration tool. Within the framework of these directives, the Flemish road charge is a tax consisting of an infrastructure charge and an external cost charge.[24] In February 2020, the OECD advised Belgium to consider expanding the existing road charge system.[25] The European Commission proposed the introduction of a smart distance charge for passenger cars in the European Green Deal.[26]

According to the subsidiarity principle, the charging of vehicles falls within the competence of Member States and therefore no secondary rules on this issue exist at EU level. Member states are free to decide whether to implement road charges, on which part of the road network and to what extent infrastructure costs will be recovered.[27] The majority of Member States have implemented some form of road charging system, however, only a minority of have adopted distance-based charges for heavy-goods vehicles.[28]

From the outset, it is important to note that while these directives set out a range of common rules, they do not compel Member States to organise toll charges as a 'tax', nor do they regulate the legal relationship between the road users, (tax) authorities and service providers from a taxation perspective. Consideration 56 of Directive 2019/520 states that the directive does not affect the Member States' freedom to lay down rules governing road infrastructure and taxation matters. The legal ground for this directive is Article 91 of the TFEU concerning international transport.

However, these directives lay the ground rules for a system where toll chargers can cooperate with EETS providers to create an electronic road toll system, including the possibility for the service providers to invoice the tolls. However, the toll charger may require that the EETS provider invoices the user in the name and on behalf of the toll charger (Art. 6.4 Directive 2019/520), to avoid 'adverse administrative and tax implications' (Consideration 42 of Directive 2019/520).

In sum, the qualification as a tax of the Flemish Tax Code does not always seem to sit well with the current EU Framework. While recognising possible interference with taxation, the EU directives do not equate the envisaged tolls with taxes.

---

24. Art. 2 Toll directive 17 June 1999.
25. OECD Economic Surveys, *Belgium, February 2020*, Paris, OECD Publishing, 2020, 38-39.
26. COM(2019)640,11; Briefing (European Parliament), Road charges for private vehicles in the EU, May 2016, www.europarl.europa.eu/RegData/etudes/BRIE/2016/583781/EPRS_BRI(2016)583781_EN.pdf.
27. D. SCORDAMAGLIA, "Revision of the Eurovignette Directive", *European Parliamentary Research Service*, March 2021, 4.
28. D. SCORDAMAGLIA, "Revision of the Eurovignette Directive", *European Parliamentary Research Service*, March 2021, 4.

Nevertheless, the FKT is explicitly qualified as a tax and can therefore be assessed in relation to other, existing taxes.

2.2. *The Belgian legal context on road charges*

Due to the Belgian constitutional structure, the introduction of a road charge falls under the competence of the Belgian regions (i.e., the Flemish Region, the Walloon Region and the Brussels Capital Region). These Belgian regions concluded an Interregional Cooperation Agreement in 2014. The FKT can thus be situated within an interregional legislative project with the objective of simultaneously introducing a distance charge for the use of the road network.[29] The Interregional Cooperation Agreement entails a legal framework wherein the regions were able to design their own version of a distance charge, permitting them to determine their own policy goals and applicable rates. It also sets up an intermediary coordinating public body named 'Viapass'. The Flemish Region and the Brussels Capital Region both created a tax, while the Walloon Region opted for a retribution.[30] The classification as a tax in the Flemish Region implies that certain constitutional principles and legislative provisions regarding the legal protection of the taxpayer apply. Examples of constitutional principles are: (i) the principle of legality (Art. 170 and 172, para. 2 Belgian Constitution)[31]; (ii) the principle of annual ratification (Art. 171 Belgian Constitution); and (iii) the equality principle (Art. 172 Belgian Constitution). Furthermore, procedural rules and safeguards can be found in applicable tax laws, such as the Flemish Tax Code.

2.3. *The Flemish legal context regarding the Flemish Tax Code*

In the Flanders Region, the general principle holds that VLABEL will perform the public services regarding regional taxes.[32] In its '2020-2024 Business Plan', VLABEL mentions the establishment and the collection of the taxes under its

29. Art. 1, 10° Interregrional Cooperation Agreement; For the situation in the Walloon Region, see M. BOURGEOIS and S. BAHI, "Le prélèvement kilométrique pour les poids lourds en Région wallone", *Revue de Fiscalité Régionale et Locale* 2019, issue 7, 7-8.

30. The Flemish Region voted the Decree of 3 July 2015 introducing a kilometre tax and discontinuing the Eurovignette levy and amending the Flemish Tax Code of 13 December 2013 in that respect. The Walloon Region introduced a road charge retribution through the decree of 16 July 2015 introducing a mileage retribution for road use by heavy-goods vehicles. For the Brussels-Capital Region, this is the Ordonnance of 29 July 2015 introducing a kilometre tax in the Brussels-Capital Region for heavy-goods vehicles intended or used for the transport of goods by road, replacing the Eurovignette (published in the *Belgian Official Gazette* on resp. 10 August 2015, 28 July 2015, 12 August 2015).

31. Cass. 21 May 1982, *Arr.Cass.* 1982, 1172.

32. See Art. 3 VLABEL Founding Decree 11 June 2004.

control as an operational objective.[33] In principle, this objective will be achieved by the application of the uniform procedural and material tax provisions enshrined in the Flemish Tax Code.[34]

However, in the case of the FKT, the Flemish legislator has outsourced several key elements of the taxation process to external service providers. The latter are defined as "any legal entity authorized by a toll charger in its toll domain to provide a service of invoicing to users, collection and remittance to the regions or to their designated concessionaires, of mileage based on data recorded by an electronic device".[35] The external service providers will provide to the taxpayers the on-board units, which register the distance that they have driven on certain roads (e.g., motorways). They will then calculate the amounts of tax due based on these data and send an invoice to the taxpayer. It is the external service provider that collects and transfers the tax to VLABEL. Thus, the service provider will act as an intermediary between the toll charger (i.e., the Flemish Region) and the holder of a vehicle subject to the tax.[36]

When the FKT was introduced in April 2016, service provider Satellic was designated as the so-called 'single service provider'. As single service provider, it was responsible for the development and maintenance of the infrastructure needed for the kilometre tax, on the basis of a special agreement concluded by Viapass and Satellic on behalf of the regions.[37] The purpose of this agreement was to appoint a first service provider and a main contractor for the development of the road charge system in Belgium.[38] More importantly, as the single service provider, Satellic is required to conclude a service agreement with any holder of a vehicle who expresses an interest in doing so.[39]

For the operation of the FKT, the taxpayer is obliged to conclude a service agreement with an authorised service provider before using the road.[40] If a European service provider wants to enter the Belgian market, it will have to be accredited by

33. VLABEL, *Annual Report* 2020, 13-14.
34. Explanatory Memorandum with the Bill amending the Flemish Tax Code of 13 December 2013, *Parl.St.* Vl.Parl., no. 114-1, 3.
35. Art. 1, 8° Interregional Cooperation Agreement; Art. 1.1.0.0.2, 7/1° Flemish Tax Code.
36. Explanatory Memorandum with the Bill regarding the amendment of the Flemish Tax Code of 13 December 2013, *Parl.St. Vl.Parl.* 2014-15, no. 370-1, 11.
37. Art. 19, § 2 Interregional Cooperation Agreement.
38. Viapass, *Annual Report* 2014-2015, 20, www.viapass.be/downloads/jaarverslagen/.
39. Art. 5 Flemish Decree 3 July 2015 on the introduction of the kilometre tax.
40. Art. 4, § 2 Interregional Cooperation Agreement; Art. 3.3.1.0.11, § 1 Flemish Tax Code.

Viapass after undergoing extensive tests. In this regard, directive aims to guarantee access to the market on a non-discriminatory basis.[41]

2.4. *The Belgian legal context on outsourcing the taxation process*[42]

In principle, all aspects of the taxation process – establishment, calculation, collection, dispute management – are administered by the competent tax administration. For the taxes included in the Flemish Tax Code, this is VLABEL.

The Belgian Court of Auditors has made several recommendations to the Flemish Parliament regarding the outsourcing of environmental taxes.[43] According to the Belgian Court of Auditors, 'outsourcing in taxation' can be understood as outsourcing key aspects of the service of taxation to an external organisation.[44] For example, any outsourcing requires prior legislative authorisation and a decision by the highest managing body (e.g., the competent minister). As the collection of taxes constitutes as a core task of the government according to the Court of Auditors, the government must retain sufficient steering power, insight and control in the event of outsourcing.[45] The Court of Auditors indicated that this can be achieved only when the assigned competences, tasks and responsibilities given to the service providers are described in a way that is clear, concrete and easy to monitor.[46] The Court of Auditors emphasised the importance of continuity, transparency and foreseeability as leading principles of (environmental) tax policies.[47]

The position that the collection of taxes is a core government task is shared by the scarce Belgian legal doctrine that touches on the matter.[48]

---

41. See Considerations 19 and 20 of Directive No. 2019/520 and Art. 6.2 of this directive.
42. As most recently amended by the Decree of 3 May 2024.
43. See Considerations 19 and 20 of Directive No. 2019/520 and Art. 6.2 of this directive.
44. Report of the Belgian Court of Auditors to the Flemish Parliament on the collection and recovery of environmental levies, Doc 38 2000-2001 – No. 1, 19, www.ccrek.be/sites/default/files/Docs/febr_2001_milieuheffingen.pdf.
45. Report of the Belgian Court of Auditors to the Flemish Parliament on the collection and recovery of environmental levies, doc. 38 2000-2001 – No. 1, 64; See also H. MATTHIJS, "Naar een Vlaamse fiscale administratie in de 21e eeuw" in C. VANDERVEEREN and J. VUCHELEN (eds.), *Een Vlaamse fiscaliteit binnen een economische en monetaire Unie*, Antwerp, Intersentia, 1998, 424.
46. Report of the Belgian Court of Auditors to the Flemish Parliament on the collection and recovery of environmental levies, Doc. 38 2000-2001 – No. 1, 64.
47. Report of the Belgian Court of Auditors to the Flemish Parliament on the collection and recovery of environmental levies, Doc. 38 2000-2001 – No. 1, 10-14.
48. K. DEKETELAERE, "Gewestbelastingen: enkele bedenkingen bij het verleden, het heden en de toekomst" in M. DE JONCKHEERE (ed.), *Jaarboek Lokale en Regionale Belastingen 2003-2004*, Bruges, die Keure, 2004, 161; H. MATTHIJS, "Naar een Vlaamse fiscale administratie in de 21e eeuw" in

The constitutional principle of legality in tax matters obliges the Belgian legislators to, among other things, regulate all the essential elements of a tax by law (Art. 170 and 172, para. 2 Belgian Constitution). According to the Belgian Constitutional Court, these essential elements concern the designation of the taxpayer, the taxable matter, the taxable base, the tax rate and possible exemptions or reductions.[49] We do not allege that outsourcing the process of taxation in itself, even in the Belgian constitutional context with a strict principle of legality, violates any of these constitutional principles.

However, the more relevant question for the taxpayer is whether such mechanisms affect the level of (formal) legal protection awarded to the taxpayer and if so, to what extent?

This is because the outsourcing of government prerogatives that require the exercise of coercive power raises some serious concerns among scholars, including potential loss of control and accountability, difficulties with, for example, monitoring contractor performances.[50] According to scholars, principles such as transparency, neutrality, political responsibility, equity and fairness are essential to the proper exercise of the taxing power.[51] A major disadvantage of outsourcing is that the relevant expertise is carried out by the private sector, meaning that the government loses at least some of its control.[52] Problems of accountability can then occur as a result of opacity of information.[53] In the following chapter, we will assess whether this is the case with the FKT and whether additional concerns for the legal protection of the taxpayer can be identified from a procedural point of view.

C. VANDERVEEREN and J. VUCHELEN (eds.), *Een Vlaamse fiscaliteit binnen een economische en monetaire Unie,* Antwerp-Groningen, Intersentia, 1998, 436; P. VAN ORSHOVEN, "De fiscale bevoegdheid van de Vlaamse Gemeenschap en het Vlaamse Gewest" in K. DEKETELAERE (ed.), *Vlaamse Fiscaliteit. Status quaestionis 1997*, Brugge, die Keure, 1997, 6.

49. Belgian Constitutional Court 20 November 2019, No. 188/2019, B.15.2.

50. R.C. MOE, "Exploring the limits of privatization", *Public Administration Review* 1987, No. 47 457; J.D. DONAHUE, *The Privatization Decision: Public Ends, Private Means*, New York, Basic Books, 1989, 272 p.

51. J.E. STIGLITZ, *Economics of the Public Sector*, New York, Norton & Co, 1988, 390-408; S.B. PAYTON and S.S. KENNEDY, "Fiscal magic: outsourcing and the taxing power", *State and Local Government Review* 2013, vol. 45, 189.

52. H. MATTHIJS, "Naar een Vlaamse fiscale administratie in de 21e eeuw" in C. VANDERVEEREN and J. VUCHELEN (eds.), *Een Vlaamse fiscaliteit binnen een economische en monetaire Unie*, Antwerpen-Groningen, Intersentia, 1998, 424.

53. W. CAMERON, "Public accountability: effectiveness, equity, ethics", *Australian Journal of Public Administration* 2004, vol. 76, 62-63.

3. A closer look at the FKT from the perspective of the legal protection of the taxpayer

3.1. *Which actors are involved?*

The legal framework of the FKT is a complex knot of legal relationships. The FKT hinges mainly on legal relationships between the taxpayer, VLABEL and the external service providers. The taxpayer may also encounter other actors in certain cases, such as Viapass. This section will first introduce all the parties involved in the organisation of the FKT and then dissect the legal relationships that lie underneath.

3.1.1. *The taxpayer*

The FKT is payable by any holder of a vehicle for goods transport with a maximum authorised mass exceeding 3.5 tonnes and certain semi-trailer tractors (Art. 1.1.0.0.2, section 5, 6° Flemish Tax Code). The taxpayer is the holder of the qualifying vehicle, which is usually the person in whose name the vehicle is registered by the responsible authority (Art. 2.4.2.0.1 Flemish Tax Code). The FKT is aimed at both domestic and foreign taxpayers. If the vehicle is not registered, the person who has the vehicle at his disposal will be appointed as taxpayer. In the event of non-payment by the registered holder of the vehicle, the person who actually has the vehicle at his disposal (i.e., the driver) is jointly and severally liable for payment of the tax (Art. 3.10.4.5.1 Flemish Tax Code).

The taxpayer is obliged to install an on-board unit in the vehicle prior to the use of a qualifying road (Art. 1.1.0.0.2. section 1, 7/2° and 3.3.1.0.13 Flemish Tax Code). To this end, each taxpayer is obliged to enter a contractual relationship with one of the recognised service providers. The on-board unit is an electronic recording device that can check the distance covered by the qualifying vehicle and calculate the corresponding kilometre tax. To comply with their tax obligations, the taxpayer necessarily becomes the 'customer' of a private service provider.

3.1.2. *VLABEL*

VLABEL was created by the Flemish government as a government agency without legal personality in 2004.[54] It acts on behalf of the Flemish Region, which acts

54. Art. 1 Decision of the Flemish Government 11 June 2004 concerning the establishment of the agency Flemish Tax Administration, *Belgian Official Gazette* 17 July 2004 (hereafter, 'Establishment Decision

as the 'toll charger' within the system of the European directives. The main task of VLABEL, according to the founding decree of 2004, concerns "the collection, including the enrolment and the handling of objection procedures, of the Flemish taxes, including the taxes referred to as levies with the exception of the levy on water pollution, the levy on the extraction of groundwater, the environmental levy on the disposal of waste and the manure levies".[55] In principle, VLABEL has been the competent authority for all Flemish taxes since its creation.

3.1.3. *Viapass*

Viapass is an interregional legal entity set up by the Interregional Cooperation Agreement. Its purpose is to ensure cooperation, coordination and consultation between the regions in order to achieve the objectives of the Interregional Cooperation Agreement.[56] For example, Viapass can provide advice to the regions, supervise the service providers in the road charge framework and monitor the payment of the charge due by the service providers to the toll chargers. Viapass is also responsible for communication with the users and stakeholders of the Belgian road charge system. However, the above shows that Viapass is primarily a *go-between* between the regions and the service providers.[57] The taxpayer will generally not come into contact with Viapass, except in exceptional cases.

3.1.4. *External service providers*

The service providers are private companies, acting as intermediaries between the toll charger and the taxpayer/holder of a vehicle.[58] To act as a service provider on the Belgian market, service providers must be recognised by Viapass. At the time of writing, Viapass has seemingly accredited five private service providers.[59] To comply with their legal obligations under the Flemish Tax Code, a taxpayer must enter into a contractual agreement with a recognised external service provider before using certain roads with their vehicle (Art. 3.3.1.0.11, § 1 Flemish Tax Code). This restricts the freedom to retain from contracting as well as the free choice of contractor. According to the legislator, the general rules relating to Belgian

VLABEL').

55. Art. 3, 1° Establishment Decision VLABEL.
56. Art. 19 Interregional Cooperation Agreement.
57. See also Viapass, *Annual Report* 2016, 10, www.viapass.be/jaarverslag2016/index.html#I/z. (accessed 28 April 2024).
58. Explanatory Memorandum with the Bill regarding the amendment of the Flemish Tax Code of 13 December 2013, *Parl.St.* Vl.Parl. 2014-15, No. 370-1, 11.
59. www.viapass.be.

contract law remain applicable.[60] In principle, only the single service provider is obliged to conclude a so-called 'service agreement' without distinction, with any vehicle owner who so requests it.[61] In practice, service providers usually work with accession contracts where the taxpayer/customer has no space for negotiation.

3.2. *The Flemish Tax Code and the legal protection of the taxpayer*

The FKT is characterised by a particularly complex web of regulation that can be disentangled only with great difficulty. This is particularly relevant for the non-expert taxpayer, in the case of a possible expansion of the system of road charging through an outsourcing mechanism. Although the FKT is incorporated as a tax in the Flemish Tax Code, most of the procedural provisions of this code, as provided for in Title 3 of the Flemish Tax Code, were explicitly declared inapplicable to the FKT. For example, the Title 3 chapters on the assessment procedure, payments, objections, annulment and recovery of the Flemish Tax Code are declared inapplicable. As a result, the procedural framework of the FKT is partly shaped by the Flemish Tax Code and partly by the Flemish Decree of 3 July 2015 that introduced the FKT.[62]

The foregoing is, however, not the case for the administrative fines that VLABEL can impose on taxpayers in the case of non-compliance with the FKT. Title 3 of the Flemish Tax Code does apply to the administrative fines imposed in the context of the FKT. This stark division between the procedures regarding the tax itself and the procedures regarding the sanctioning mechanism of the tax will be a common thread in what follows.

The question arises as to what extent the taxpayer enjoys a similar level of legal protection and guarantees with regard to the collection of the FKT as with taxes that fall under the traditional collection methods of Title 3 of the Flemish Tax Code. In following paragraphs, we will compare the default level of (formal) legal protection of the taxpayer under the Flemish Tax Code with the level of legal protection that is offered through specific regime of the FKT.

60. Explanatory Memorandum with the Bill regarding the amendment of the Flemish Tax Code of 13 December 2013, *Parl.St.* Vl.Parl. 2014-15, No. 370-1, 21-22.
61. Art. 5 Flemish Decree 3 July 2015 on the introduction of the kilometre tax.
62. The declaration of non-application of these procedural chapters of the Flemish Tax Code was inserted in the Flemish Tax Code by Decree of 25 March 2016 (published in the *Belgian Official Gazette* on 1 April 2016). See Art. 3.1.0.0.1 Flemish Tax Code.

3.2.1. *Questions regarding the material scope of the FKT*

Prior to the conclusion of a service contract, the taxpayer should contact VLABEL with questions regarding the material scope of the Flemish Tax Code or possible exemptions.[63] If the taxpayer does not agree with the answer provided by VLABEL, no further procedural steps seem to be available. Whether the response formulated by VLABEL has any legal value is unclear. The circular adds that a Flemish taxpayers can address questions regarding the material scope of the tax to a single point of contact.[64] The taxpayer is only given an email address that presumably leads to VLABEL, but there is no guarantee that an answer will be provided, nor is there a time limit indicating when an answer may be expected. The legal status of this answer seems to be equally unclear. The circular further states that non-Flemish taxpayers should contact Viapass, which will dispatch the question to 'the most fitting Region'. If the taxpayer were to use the vehicle in the meantime, they would run the risk of being sanctioned if the FKT turns out to be applicable. There is thus no guarantee of equal treatment, nor any regulated possibility of objection.

Compared to the default level of legal protection of the taxpayer under the Flemish Tax Code, which includes the possibility to obtain an advance tax ruling from VLABEL through a regulated procedure (Art. 3.22.0.0.1 Flemish Tax Code) and a regulated objection procedure (Title 3, Chapter 5 Flemish Tax Code), the legal framework with respect to questions on the scope of the FKT is very vague. The normal objection procedure has been declared inapplicable to the FKT.

After multiple questions surrounding various unclarities raised by the Flemish Ombuds Service, an Explanatory Memo was drafted by VLABEL in 2016, outlining the procedural steps which taxpayers could take in specific cases.[65] In addition, in December 2020, a circular was issued by VLABEL containing additional clarification.[66]

Moreover, it is uncertain whether an advance tax ruling can be obtained with regard to the FKT. The circular and the memo remain silent about the possibility of this option.

---

63. Memo *De procedure voor klachten and bezwaren inzake de kilometerheffing*, FB/VLABEL/I&R, 15 March 2016, 2.
64. Circ. FB/VLABEL/2020/2, 23 December 2020, *Belgian Official Gazette* 29 December 2020, No. 19-20.
65. Memo *De procedure voor klachten and bezwaren inzake de kilometerheffing*, FB/VLABEL/I&R, 15 March 2016, http://docs.vlaamsparlement.be/pfile?id=1192096.
66. Circ. FB/VLABEL/2020/2, 23 december 2020.

3.2.2. *Terms of payment*

Taxes included in the Flemish Tax Code must be paid within a period of two months from the date of dispatch mentioned in the assessment notice (Art. 3.4.2.0.3 Flemish Tax Code).[67] However, the provisions of the Flemish Tax Code on payments do not apply to the FKT.

For the FKT purposes, the taxpayer may be faced with a much shorter payment term. The exact time frame depends on the general terms and conditions of the external service provider inserted in the service contract. For example, the general terms and conditions used by Satellic, which are available online[68], stipulate that the payment of the toll/tax should be done via a pre-paid regime or via a post-paid regime and that any balance still owed by the user must be paid at the latest within 15 calendar days of receipt of the payment document.[69]

Hence, as regards the term of payment, the difference between the rules applicable under the Flemish Tax Code and the terms of payment for the taxpayer under the FKT is enormous. In addition, different taxpayers can be faced with differing terms of payment for one and the same tax.

In case of administrative fines with respect to the FKT, the Flemish Tax Code remains fully applicable: the two-month payment term provided in this code will apply as soon as they are assessed in the name of the taxpayer (Art. 3.18.0.0.1, para. 5 Flemish Tax Code).

3.2.3. *Payment facilities*

For some taxes included in the Flemish Tax Code, taxpayers who experience payment problems may submit a reasoned request for staggered payment to the competent member of the Flemish Tax Administration (Art. 3.4.8.0.1 Flemish Tax Code). By way of comparison, in case of the FKT the relevant tax legislation does not seem to provide for the possibility of applying for payment facilities.

A taxpayer who wishes to obtain payment facilities for the FKT should contact the external service provider with whom the taxpayer entered into a contract. If the

67. The lodging of an objection, an application for *ex officio* waiver, a claim in court or a request for payment facilities does not have a suspensive effect on the payment obligation.
68. Available at www.satellic.be/sites/default/files/T%26Cs_%2025.05.2018_Final_EN.pdf.
69. Art. 7 and 8 User Agreement – Satellic General Terms and Conditions.

service provider refuses to grant these payment facilities at will, it seems that the taxpayer should turn to the court to grant a moratorium and suspend the claims. The court may, at the request of the debtor, grant moderate payment facilities (Art. 5.201 Civil Code and art. 1333 *ff*. Code of Civil Procedure).

Therefore, contrary to what is normally the case for taxes regulated by the Flemish Tax Code, no procedure to obtain payment facilities is available for the taxpayer under the FKT. Moreover, the financial thresholds of going to court may constitute an additional impediment for the legal protection of the taxpayer who wishes to obtain payment facilities under the FKT.

In case of an administrative fine imposed for infringement of the FKT, a request for a staggered payment may be submitted in accordance with the provisions of the Flemish Tax Code as soon as it is assessed in the name of the taxpayer.

3.2.4. *Late payment*

In the event of late payment, the Flemish Tax Code states that late payment interest will be charged at an annual rate of 4 %. There is, however, the possibility of an exemption of paying interest in special cases and under certain conditions (Art. 3.9.1.0.1 and 3.9.1.0.2 Flemish Tax Code). Due to the legal architecture of the FKT, a different rule applies regarding the interest on late payments, which is again fixed by the terms of the contracts employed by the external service providers.

For example, Satellic's general terms and conditions provide that late payment interest is calculated at the rate pursuant to the Law of 2 August 2002 on combating late payments in commercial transactions, which has been fixed at 12,5 % for the first semester of 2024, more than three times the annual rate included in the Flemish Tax Code.[70]

Assessed against the default regime of the Flemish Tax Code, the difference in late payment interest is enormous and strongly to the disadvantage of the taxpayer. Furthermore, different taxpayers might be confronted with different interest rates, depending on the terms and conditions used by their service providers.

For fines imposed on the basis of the FKT, an interest rate of 4 % is applicable, as these fines are subject to the standard procedural framework of the Flemish Tax Code.

70. Art. 8.1. (f) User Agreement – Satellic Terms and Conditions.

3.2.5. *Suspension of the service contract*

Once a service contract has been concluded between the taxpayer and a service provider for the provision of the on-board unit, the contract must remain in force in order for the taxpayer to be compliant with their tax obligations under the FKT. The question of if and when the service contract might be suspended by the service provider is therefore crucial, as such a suspension precludes the taxpayer from being able to use the road network. The Flemish Decree of 3 July 2015 provides an exhaustive list of circumstances that allow the service provider to suspend the service agreement with the taxpayer.[71]

The service provider can only suspend the contract in where: (i) the taxpayer does not meet their payment obligations to the service provider as stipulated in the service agreement; (ii) the taxpayer has failed to provide sufficient guaranteed means of payment; (iii) the taxpayer uses the on-board unit contrary to the instructions given by the service provider; (iv) the taxpayer fails to report a defect in the on-board unit; and (v) the taxpayer disregards the instructions given by the service provider to replace or repair a defective on-board unit.

In the event of a suspension, the service provider should immediately inform the holder of the vehicle as well as VLABEL. Until the service provider has notified the region involved of the suspension, it bears the risk of non-payment. Although the holder of a vehicle is explicitly designated as the taxpayer according to the Flemish Tax Code, the taxpayer is not the actual debtor of the tax *vis-à-vis* the government under the FKT. If a valid contract has been concluded and the suspension of said contract has not yet been communicated to VLABEL, the latter can only recover the tax due from the external service provider. It is therefore the service provider who bears the debtor risk. This means that as far as the collection of the tax itself is concerned, any direct legal relationship between the tax authorities and the taxpayer appears to be non-existent, as the service provider collects the tax 'in the name and on behalf' of the region.[72] VLABEL can claim the unpaid taxes from the external service provider to the extent that the amount of the charge due per holder

71. Art. 27 Flemish Decree 3 July 2015. The same grounds for suspension are included in the Interregional Cooperation Agreement.

72. Art. 7, para. 1 Flemish Decree 3 July 2015. The service provider issues an invoice/payment document to the taxable person. In the explanatory memorandum to the Flemish Decree of 3 July 2015, in line with the 'in the name and on behalf of' criterion of Art. 7, it is stated that the external service provider is the representative of the region; Explanatory Memorandum with the Bill regarding the amendment of the Flemish Tax Code of 13 December 2013, *Parl.St. Vl.Parl.* 2014-2015, No. 370-1, 11.

of the vehicle can be determined.[73] In order to ensure payment by the taxpayer, the service agreement may impose the provision of guaranteed means of payment. This allows the service provider to collect the amounts due, without authorisation from the holder of the vehicle, who will not be able to cancel the payments that are made.[74]

What should happen when a suspension is notified to VLABEL? The Interregional Cooperation Agreement states that once the suspension is notified to the toll charger (i.e., the region involved), it will be able to recover the amounts due directly from the taxpayer.[75] The Explanatory Memorandum of the Flemish Decree of 3 July 2015 affirms that "as soon as the service provider has notified the toll charger of the suspension of the service contract, the toll charger shall collect the charge due directly from the holder of the vehicle".[76] The memorandum then claims that this scenario will be dealt with in a separate article in the Flemish Tax Code.[77] However, this article is nowhere to be found in the Flemish Tax Code. The Explanatory Memorandum makes this claim with regard to Article 3.3.1.0.11 of the Flemish Tax Code. Interestingly, there is no Article 3.3.1.0.12 to be found in the Flemish Tax Code. The Code immediately makes the jump to Article 3.3.1.0.13. It seems that even the legislator got lost in the complex legal setting of the FKT in the Flemish Tax Code.

According to the Memo, however, enforcement measures will be initiated from the moment the service agreement is suspended.[78] Thus, from that moment on, no more tax will be levied, but administrative fines will be imposed if one continues to use the road with a vehicle subject to the FKT. According to the Memo, VLABEL will first issue a 'violation notice' with an immediate invitation to pay the fine. Under normal circumstances, such an administrative fine is subject to the normal assessment procedure in the Flemish Tax Code.

As explained above, an exception is made for the FKT. These fines can be collected by VLABEL without an assessment in the name of the taxpayer (Art. 3.2.2.0.1

73. Art. 7 Flemish Decree 3 July 2015.
74. Art. 1, 11° Interregional Cooperation Agreement.
75. Art. 5, 8° Interregional Cooperation Agreement.
76. Explanatory Memorandum with the Bill regarding the amendment of the Flemish Tax Code of 13 December 2013, *Parl.St. Vl.Parl.* 2014-2015, No. 370-1, 22-23.
77. Explanatory Memorandum with the Bill regarding the amendment of the Flemish Tax Code of 13 December 2013, *Parl.St. Vl.Parl.* 2014-2015, No. 370-1, 22-23.
78. Memo *De procedure voor klachten and bezwaren inzake de kilometerheffing*, FB/VLABEL/I&R, 15 March 2016, 3.

Flemish Tax Code).[79] The Memo, of which the legal status is unclear, states that no formal objection procedure is available for the taxpayer in this stage.[80] Therefore, in this stage, all contacts between VLABEL and the taxpayer take place outside of any regulated procedure.

If, however, the taxpayer does not pay the fine spontaneously, a formal assessment procedure will be initiated by VLABEL according to the standard provisions of the Flemish Tax Code.

3.2.6. *Objections and complaints procedures*

The Flemish Tax Code (Title 3, Chapter 5) provides for a uniform procedure for administrative objections. Taxpayers who do not agree with an established tax assessment may lodge a reasoned objection with VLABEL within three months (Art. 3.5.2.0.1 Flemish Tax Code). The objector has the right to be heard, if has explicitly requested this in his notice of objection. VLABEL will rule on the appeal by reasoned decision, which will be notified in writing and state how further legal action may be taken (Art. 3.5.1.0.1 *ff* Flemish Tax Code). Should the taxpayer still disagree with the position taken by the tax authorities, he is able to challenge the decision taken by the tax authorities before the courts. Objections can therefore be submitted by taxpayers via a well-regulated administrative appeal procedure.

How does this play out in the context of the FKT? As already mentioned, the chapter on administrative objection procedures is largely declared inapplicable to the FKT. To assess how the FKT compares against this default regime under the Flemish Tax Code as regards the objection procedure, a distinction should be made between complaints regarding: (i) the collection of the tax; (ii) the administrative fines; and (iii) the regulations governing the FKT.

79. It was already emphasised that the Chapter 'Assessment' of Title 3 in the Flemish Tax Code has been declared inapplicable for the Flemish Tax Code. However, as stated above, this exclusion applies only to the collection of the tax itself and not to administrative fines related to the tax. The latter are regulated by Art. 3.18.0.0.1, § 5, second paragraph of the Flemish Tax Code. This provision reads as follows: "The administrative fines referred to in paragraph 4/1 shall be recovered in accordance with the provisions of Title 3, with the exception of Article 3.1.0.0.1.(1) and (2), and the provisions relating solely to a tax other than the kilometre tax mentioned in Title 2" (translation by the authors).

80. Memo *De procedure voor klachten and bezwaren inzake de kilometerheffing*, FB/VLABEL/I&R, 15 March 2016, 3.

3.2.6.1. Objections and complains relating to (the collection of) the tax

The legislative provisions of the FKT do not clearly state to whom the taxpayer should be directed in the case of an objection against the (payment of) the tax itself. This matter is addressed in the Memo of the Flemish Tax Administration.[81] This Memo states that once a valid service contract has been concluded with a recognised external service provider, there is no possibility for a regulated administrative appeal procedure if the taxpayer does not agree with the concrete 'method of taxation' (*sic*). After all, the system does not work with a notice of assessment issued by the tax authorities, but with an invoice originating from the external service provider based on a contract. The only relevant legal relationship is therefore between the taxpayer and the external service provider. This relationship is generally governed by the general terms and conditions applicable between the taxpayer and his service provider. This implies that the possibilities for objection and the procedure for doing so may vary. By way of illustration, consider the relevant passage from the general terms and conditions of Satellic[82]:

18. COMPLAINTS

(a) Any complaints from the User related to the services provided by Satellic (including, but not limited to, complaints related to the invoices issued by Satellic and/or the (refund or non-refund of the OBU Deposit), must be notified to Satellic via the complaint form available on Satellic's website, at the latest within 30 calendar days of the event giving rise to the complaint.

(b) **Services and invoices which have not been subject of a complaint filed in accordance with clause 18(a), are irrevocably deemed to be accepted by the User and can no longer be contested.**

(c) All complaints filed in accordance with clause 18, will be examined and answered to by Satellic without undue delay.

(d) Filing a complaint in accordance with clause 18, does not relieve the User from its payment and other obligations under the User Contract.

(e) Complaints relating to:

(i) the Road Pricing Regulations and the applicable Toll tariffs;

(ii) the payment methods used by the User;

cannot be addressed to Satellic, but have to be addressed to – respectively – (i) the competent authorities or (ii) the payment service provider.

This procedure does not provide the taxpayer with the possibility to lodge an appeal in any administrative sense, but only offers the possibility to file a complaint with the service provider. The taxpayer is thus obliged to lodge a complaint with the service provider or to go to court. This can be problematic seeing that, in the case of a dispute, an administrative appeal is the first step in the legal protection of a taxpayer. The general terms and conditions of Satellic offer a deadline of 30 calendar days for lodging a complaint. This is very short in comparison

81. Memo *De procedure voor klachten and bezwaren inzake de kilometerheffing*, FB/VLABEL/I&R, 15 March 2016, 3.

82. Art. 18 User Agreement – Satellic Terms and Conditions.

with the standard objection period of three months in the Flemish Tax Code (Art. 3.5.2.0.1). Furthermore, Satellic does not provide a time limit for dealing with the lodged complaint. It just states that complaints will be investigated and answered 'without delay'. The Memo adds that if the taxpayer is dissatisfied with the answer or complaints procedure at hand, he can contact the Complaints Service of the Department of Finance and Budget.[83] According to the Flemish Complaints Decree, a complaint will be dealt with within 45 days.[84] As a last resort, the taxpayer can turn to the Flemish Ombuds Service.

The complexity of this procedure and the many ambiguities that it contains greatly reduces the taxpayer's legal protection. If the taxpayer experiences issues with the collection of the FKT, he cannot lodge an administrative appeal. What the taxpayer *can* do is complicated and has little prospect of legal certainty. In addition, different service providers will apply different general terms and conditions, which can lead to a difference in treatment of taxpayers within the same tax.

3.2.6.2. Objections and complains relating to administrative fines

As mentioned in Section 3.2.5. *in fine*, for complaints relating to administrative fines, the taxpayer can only contact the Complaints Department of the Department of Finance and Budget *before* the administrative is assessed in his name.[85] From the moment the fine is formally assessed by the authorities, the taxpayer can only make use of the formal administrative appeal procedure as provided for the Flemish Tax Code. The Memo remains silent about the consequences of a formal assessment of an administrative fine for an ongoing complaint launched *before* the formal assessment of said fine.

3.2.6.3. Objections and complains relating to applications of the regulations governing the FKT

Complaints regarding the application of the regulations on the FKT that do not concern the external service provider's services, payment document or invoice, are dealt with by the Complaints Service of the Department of Finance and Budget

83. Memo *De procedure voor klachten and bezwaren inzake de kilometerheffing*, FB/VLABEL/I&R, 15 March 2016, 5.
84. Flemish Complaints Decree of 1 June 2001 on the right of complaint regarding government institutions, *Belgian Official Gazette* 17 July 2001.
85. Memo *De procedure voor klachten and bezwaren inzake de kilometerheffing*, FB/VLABEL/I&R, 15 March 2016, 5.

and then, if necessary, by the Flemish Ombuds Service. These include, for example, complaints about the application of the rules on taxable matters, exemptions, and the handling of organised administrative appeals.

These types of complaint do not relate to the legal relationship between the external service provider and the taxpayer but rather to the text of the law or to the conduct or procedures of VLABEL in cases where the taxpayer has a direct contact with the tax administration, these types of complaint follow the default rules for similar types of complaints outside the FKT.

3.2.6.4. Conclusion on objection and complaints procedures

It can be concluded that a taxpayer, who wishes to invoke his right to complain or object within the framework of the FKT, is confronted with a non-transparent legal framework, which differs fundamentally from the standard legal framework of the Flemish Tax Code. The taxpayer will normally only come into contact with VLABEL in case of an administrative fine, and even then, the procedure may differ from what is the case for other taxes under the Flemish Tax Code.

In cases where the taxpayer aims to object to the concrete method of *taxation* (i.e., the determination, the assessment, the collection, etc., of *the tax itself*), he will be confronted with (differing) contractual frameworks imposed by the general terms of conditions of the private service providers.

The administrative procedures that protect the taxpayer are taken out of the equation in many cases and replaced by contractual mechanisms that may differ between service providers, and that certainly differ from the normally applicable administrative procedures, often to the disadvantage of the taxpayer.

3.2.7. *Legal disputes on taxation matters*

In Belgium, the Tax Chambers of the Courts of First Instance have exclusive jurisdiction over disputes regarding tax provisions, including those enshrined in the Flemish Tax Code (Art. 569, para. 1, 32° Code of Civil Procedure). In principle, the admissibility of tax cases is subject to the requirement for the plaintiff to have lodged a prior administrative appeal. The claim must then be brought to court within three months of the notification of the final administrative decision pursuant to this administrative appeals procedure (Art. 1385*undecies* Code of Civil Procedure). Yet, the FKT does not provide the taxpayer with the possibility to lodge such an administrative appeal.

This leads to the question of whether a dispute relating to the application of the FKT as a tax can even be qualified as a dispute relating to a tax matter. After all, the taxpayer can choose to go to court directly, instead of lodging a complaint with the service provider.[86] It is unclear whether VLABEL and/or (only) the external service provider would be the counterparty in court. Disputes concerning the application of a tax provision presuppose a dispute between a taxpayer and the tax administration.[87] It is, however, very unlikely that VLABEL would pose as the counterparty seeing that the only eligible legal relationship is the contractual relationship between the taxpayer and the external service provider. It remains to be seen whether the court would declare the case admissible if the taxpayer initiated a tax dispute against a private service provider with whom the taxpayer is in a contractual relationship.

More realistically, such a dispute will have to be brought before the commercial courts, since it concerns a dispute between 'undertakings' in the sense of Article I.1, 1° of the Code of Economic Law.[88] Once again, the taxpayer is left with uncertainty and a diminished degree of legal protection.

3.2.8. *The applicability of general contract law*

According to the legislator, the standard provisions of general contract law remain applicable to the service contract between the taxpayer and the service provider.[89] The interference with the underlying tax relationship can, however, complicate matters. For example, the question arises as to how contract law mechanisms will play out if, for example, one of the contracting parties is perceived to be in default of its obligations. According to Article 5.239 of the Belgian Civil Code, a party is allowed to suspend its own performance under a contract, if the other party carries out its obligations.

Suppose a taxpayer within the context of the FKT is under the impression that a service provider is in default of its own obligations under the service contract and decides to suspend its own performance and refuses to pay the (full) amount to the

86. Memo *De procedure voor klachten and bezwaren inzake de kilometerheffing*, FB/VLABEL/I&R, 15 March 2016, 3.
87. P. VAN ORSHOVEN, "Administratieve rechtbanken? Ja en nee. Pleidooi voor jurisdictioneel monisme", *RW* 1994, vol. 58, 497.
88. After all, both the external service provider and the taxpayer will be 'undertakings' as specified by Art. I.1, 1° WER within the framework of the FKT. See Art. 573 Code of Civil Procedure.
89. Explanatory Memorandum with the Bill regarding the amendment of the Flemish Tax Code of 13 December 2013, *Parl.St. Vl.Parl.* 2014-15, No. 370-1, 21-22.

service provider. Is that party then engaging in tax fraud? Suppose that the service provider would respond by suspending the entire agreement, which it is *prima facie* allowed to do under the applicable law. As a result, the taxpayer would not be able to use their vehicle without running the risk of being fined.

Thus, having a tax collected by a private entity based on a contractual relationship with the taxpayer may distort the contractual balance that should normally apply between two contracting parties. The result is a significant power imbalance, which raises the question whether the service provider runs the risk of being confronted with claims under Belgian competition law, which prohibits the 'abuse of economic dependency' between undertakings in Article IV.2/1 of the Code of Economic Law. Moreover, as of 1 December 2020, the Code of Economic Law (Art. VI.91/1 *ff.*) provides for a legal framework on unlawful terms in B2B contracts. A further analysis of these legal frameworks is beyond of the scope of this paper.

4. Conclusions and recommendations

In an effort to internalise the negative externalities of (heavy goods) road traffic and in order to finance the maintenance and development of the road network, European governments have been introducing road charging systems in an effort to create a more sustainable environment. Even though tolls and vignettes are not mandated by the EU, the EU has created a legislative framework to ensure a degree of uniformity and to avoid unnecessary hindrances for the EU Internal Market.

Against this regulatory background, the Belgian regions have introduced their own system of road charging for heavy-goods vehicles. Belgian regional governments are exploring the possibility of introducing similar road charging mechanisms for passenger motorised vehicles as well.

In the Flemish Region, the 'kilometre tax' is no mere toll, but is conceptualised as a tax and was embedded in the Flemish Tax Code. This is not the consequence of an obligation under EU law, but it is the qualification given to this charge by the Flemish legislator.

However, as most key elements in the process of taxation are 'outsourced' to private service providers, the FKT has provided us with an opportunity to assess the legal consequences of such an outsourcing mechanism for the legal protection of the taxpayer.

The result of this outsourcing exercise is an utmost complex legal regime that raises various questions and uncertainties surrounding the legal protection of the taxpayer, especially when the legal position of the taxpayer is assessed against the 'default regime' of legal protection for taxpayers for other taxes included in the Flemish Tax Code.

One can think of the shorter payment terms, huge differences in late payment interest rates, the lack of an organised administrative appeals procedure (unless for fines), several procedural uncertainties and ambiguities, divergences between service contracts employed by different service providers and the uncertainty as to the competent court. Moreover, information is spread out in several legislative texts and accompanying documents such as circulars and memos, instead of being integrated in the orderly structure of the Flemish Tax Code.

At its very core, this complexity is the result of the addition of private service providers as 'intermediaries' between the taxpayer and the tax administration and the (partial) displacement of the direct legal relationship between the taxpayer and tax administration governed by tax and administrative law, by a contractual relationship between the taxpayer and private service providers. It almost every case, it results in a diminished level of (formal) legal protection for the taxpayer.

The foregoing should not be construed as a plea against the involvement of private third parties in the taxation process. Yet, the FKT-mechanism can provide lessons for any legislator of government thinking of applying such an outsourcing mechanism. As the foregoing demonstrates, a comprehensive benchmarking exercise should be made relative to the default tax procedures in order to minimise the legal complexity and legal uncertainty for the taxpayer and to avoid a net decrease in legal protection for the taxpayer.

In the Flemish Region, this will be all more pressing should the FKT be expanded, in any form, to include passenger motorised vehicles as well, as it would mean that taxpayers outside of any professional capacity would be confronted with a legal regime fraught with uncertainty and complexity, should any problem arise in the course of using the road as an everyday activity.