





DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

# 'Tax rulings' in the EU Member States

## IN-DEPTH ANALYSIS

### **Abstract**

This paper forms part of a series of analytical pieces on the absence of EU-coordination regarding aggressive tax planning and its effects, prepared by Policy Department A at the request of the ECON Committee of the European Parliament. It deals with the question what advance tax rulings, advance pricing agreements and other tax arrangements currently are like and how they are meant to develop. Therefore, it is necessary to understand the reasons of their existence and to know the legal and policy limits that should be taken into account on OECD, EU and national levels. The paper gives an overview of the features of tax rulings in general and of the tax rulings practices in the 28 Member States in concrete terms.

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## LIST OF ABBREVIATIONS

<b>APA</b>	Advance Pricing Agreements
<b>AT</b>	Austria
<b>ATR</b>	Advance Tax Rulings
<b>BE</b>	Belgium
<b>BG</b>	Bulgaria
<b>CA</b>	Competent authority
<b>CCCTB</b>	Common Consolidated Corporate Tax Base
<b>CH</b>	Switzerland
<b>CY</b>	Cyprus
<b>CZ</b>	Czech Republic
<b>DE</b>	Germany
<b>DK</b>	Denmark
<b>EC</b>	European Commission
<b>ECOFIN</b>	Council of Economics and Finance Ministers
<b>ECRH</b>	European Convention on Human Rights
<b>EE</b>	Estonia
<b>EL</b>	Greece
<b>EOI</b>	Exchange of Information
<b>ES</b>	Spain
<b>EU</b>	European Union
<b>EUTPD</b>	European Union Transfer Pricing Documentation
<b>FI</b>	Finland
<b>FR</b>	France
<b>HMRC</b>	HM Revenues & Customs
<b>HR</b>	Croatia
<b>HU</b>	Hungary
<b>IBFD</b>	International Bureau of Fiscal Documentation
<b>IE</b>	Ireland
<b>IFA</b>	International Fiscal Association

- IT** Italy
- JTPF** Joint Transfer Pricing Forum
- LT** Lithuania
- LU** Luxembourg
- LV** Latvia
- MAP** Mutual Agreement Procedure
- MS** Member State
- MT** Malta
- NL** Netherlands
- OECD** Organisation for Economic Cooperation and Development
- PL** Poland
- PT** Portugal
- RO** Romania
- SE** Sweden
- SI** Slovenia
- SK** Slovak Republic
- SME** Small and Medium-Sized Enterprises
- TP** Transfer Pricing
- UK** United Kingdom
- VAT** Value Added Tax

## EXECUTIVE SUMMARY

'Tax rulings' are made around the world and have developed as a consequence of a change in mentality within the tax authorities, an aspiration for a higher degree of tax compliance and economic investments, and as a consequence of the taxpayer's pursuit of legal certainty. Tax rulings are one of the instruments towards a more reciprocal relationship between the tax authorities and the taxpayer. Tax rulings are meant to be in accordance with OECD, European Union and national legal and policy limits. The most important conclusion of the international limitation on tax rulings is that the OECD asks for more transparency and equal treatment of all taxpayers by the publication of the conditions for granting, refusing and revoking tax decisions. The EU asks for more transparency of tax rulings as well. Why, today – in the Proposal for a Council Directive amending Directive 2011/16/EU – focus only on the exchange of information regarding tax rulings between tax authorities and the European Commission, and not debate on further strengthening EU provisions for the publication of national tax rulings procedures and even the issued tax rulings themselves? Moreover, changes in the exchange of information of tax rulings should be accompanied with guarantees for taxpayers' rights.

Where the tax authorities have a wider margin of appreciation, the principle of equality must be viewed as a supplementary requirement of legitimacy or as a general principle of proper administration. It is essential for the invocation of the principle of equality that the tax ruling is made sufficiently available so that a similarity test can be applied. A necessary first step in the application of the principle of equality is publishing the procedural steps and the general policy on granting, refusing and revoking tax rulings. Based on the principle of equality, tax authorities are not allowed to deviate randomly from administrative (legal) policy rules. Moreover, equality before the law is guaranteed by article 14 of the ECHR as well. Third parties must be able to invoke the principle of equality as a principle of proper administration as well. For this reason, tax authorities must guarantee the accessibility and the uniformity of their policy to rule and even of the individual tax rulings. Supervision by all taxpayers and a minimal degree of disclosure are crucial elements for the credibility and perception of tax rulings, especially in the current tax ruling context where justice must not only be done, but also be seen to be done.

The term 'tax rulings' is used as collective term for all kinds of tax 'arrangements'. A tax ruling may occur in the form of an advance tax ruling, an advance pricing agreement or any other 'tax arrangement'. There are formal and informal 'tax rulings'. An 'advance tax ruling' is a statement provided by the tax authorities, or an independent council, regarding the tax treatment of a taxpayer with respect to his future transactions and on which he is – to a certain extent – entitled to rely. An 'advance pricing agreement' determines (in accordance with the law and the OECD Guidelines) in advance if the transfer price between two related parties within a group is at arm's length compared to the transfer price with an unrelated party. In practice, many other 'tax arrangements' are made – without any framework – between the taxpayer and the local tax inspector before a specific transaction takes place or before filing the tax return, after a tax mediation process, in court, within a horizontal monitoring process, or, within the context of a tax audit. It is clear that it is the European Commission's intention to cover the administrative practice of advance tax rulings, advance pricing agreements and all 'other advance tax arrangements', even within the context of a tax audit. The crucial question arises if Member States will qualify their country-specific 'statements', 'opinions', 'decisions', 'clearances', etc. as a 'tax ruling' in the sense of this EC proposal on automatic exchange of information.

There are as many 'tax rulings' systems as there are countries in the world. Should the EU think about more coordination or harmonisation of tax rulings procedures? There are long traditions as well as recent developments on tax rulings in EU Member States. Some Member States have a legal or (more or less modest) administrative/policy framework for the 'tax rulings' (in the broad sense, i.e. 'tax arrangements') practice, others do not. Tax rulings practices on the basis of a legal or administrative framework that is known by the taxpayers, should be encouraged. Tax rulings could deal with all kinds of tax topics, although the request could be restricted to some specific tax matters as well. In general, 'tax rulings' (in the broad sense) have a binding effect on the tax authorities (on the basis of a legal/administrative provision for advance tax rulings and advance pricing agreements, or on the basis of the principle of legitimate expectations), but this is mostly under condition (no modification of the legislation, nor of the facts, not contra legem, etc.). The applicant-taxpayer is in principle not bound by an obtained advance tax ruling, which means that he can choose not to do the transaction. Tax rulings could be delivered by the tax authorities in the broad sense or by a specific commission. Member States can ask for a fee for an advance tax ruling or advance pricing agreement, but they do not ask for an informal arrangement. Opinions on the disclosure of tax rulings differ. It is very difficult to discover if and which tax rulings/policies are published. It is even more difficult to find out if Member States exchange information on tax rulings spontaneously or on request. Literature on these questions is very rare. In some Member States appeal against 'tax rulings' is foreseen, in others it is not, or it is unclear whether it is possible. However, Models of Taxpayers' Rights prescribe the possibility of judicial review.



## 1. THE CONTEXT IN WHICH TAX RULINGS CAN EXIST

### KEY FINDINGS

- 'Tax rulings' are made around the world and have developed as a consequence of a change in mentality within the tax authorities, an aspiration for a higher degree of tax compliance and economic investments, and as a consequence of the taxpayer's pursuit of legal certainty.
- Tax rulings are one of the instruments towards a more reciprocal relationship between the tax authorities and the taxpayer.
- Tax rulings are meant to be in accordance with OECD, European Union and national legal and policy limits. Special attention is given to the transparency of the conditions for granting tax rulings.
- Changes in the exchange of information of tax rulings should be accompanied with guarantees for taxpayers' rights.

### 1.1. Similar reasons for the existence of tax rulings worldwide

Throughout the world, tax authorities and taxpayers consult with each other. Throughout the world, similar reasons explain this phenomenon.

#### 1.1.1. Horizontalisation and tax compliance

On the one hand, there has been – in some countries for much longer than in others – a continual change in mentality within the tax authorities. In fact, there is a worldwide tendency to a more 'horizontal', 'renewed' or even (as introduced by the OECD Forum on Tax Administration in 2006)<sup>1</sup> a tendency to a so-called 'enhanced' relationship between the tax administration and the taxpayer. Tax authorities speak about a change of mentality: the taxpayer has to be considered as a customer. He deserves a good service, if he voluntarily gives information about potential tax risk positions (a kind of self-risk assessment) and if he provides comprehensive responses to the tax authorities.

Such a high degree of disclosure deserves a taxation that is quick, fair and efficient. In this relationship, tax authorities should understand the taxpayer's commercial and tax strategy, and should act fairly and not mainly revenue-oriented. An example of such an 'enhanced

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<sup>1</sup> OECD Forum on Tax Administration, Seoul Declaration 2006: <http://www.oecd.org/ctp/administration/seouldeclarationoecdtaxadministratorstojoinforcesinfightingtaxnon-compliance.htm>; OECD Cape Town Report 2008 of the Forum on Tax Administration: <http://www.oecd.org/southafrica/oecdterritorialreviewscapetownsouthafrica.htm>: 'Chapter 8. The enhanced relationship', *Study into the Role of Tax Intermediaries*, Cape Town, January 2008, 40; Owens, J., 'The 'Enhanced Relationship': A Challenge for Revenue Bodies and Taxpayers', *European Taxation*, 2008, 351.

relationship' is the Dutch system of 'horizontal monitoring' as an alternative to 'vertical tax audits' of multinational enterprises.<sup>2</sup>

Tax rulings would incite a greater willingness in the taxpayer to pay his taxes – leading to a higher degree of tax compliance, and therefore resulting in less tax avoidance or fraud and fewer conflicts and legal disputes.

### 1.1.2. Tax uncertainty and foreign investments

On the other hand, there is no escaping the conclusion that tax legislation is complex, extensive, variable, unclear, uncertain and vague.<sup>3</sup> Consequently, it is very difficult for the taxpayer to judge for himself the legal tax consequences of his actions. In particular, the general anti-avoidance provisions could lead to a lot of discussions between the taxpayer and the tax administration.

Therefore, taxpayers want to know the administration's legal interpretation of tax law before doing any transaction. Thus, it is clear that tax rulings contribute to legal certainty. In France, a lot of research on the link between tax certainty and tax compliance has been done, and one of the measures was enhancing the tax ruling procedure. Tax arrangements can be made at later stages as well. Of course this evolution suits the authorities particularly well, because tax certainty attracts foreign investors to the country.

## 1.2. Tax rulings as an instrument towards a more reciprocal relationship between the tax authorities and the taxpayer...

The tendency towards a more reciprocal relationship between the tax authorities and the taxpayer – with tax rulings as one of the instruments to reach this goal – can be illustrated by some research initiatives in France a few years ago.

Barilari, the French *Directeur général des impôts*, published his book *Le consentement à l'impôt* in 2000.<sup>4</sup> In this book, the author studied how the relationship between the tax authorities and the taxpayer has evolved over the centuries and how it can be improved. The author proposes measures towards greater tax compliance. He suggests the re-establishment of the principle of legality, the promulgation of a simpler, more accessible and stable tax legislation, the extension of the parliament's controlling and initiating competences, compliance with the principle of equality and making the relationship between paying taxes and a good financial policy somewhat more transparent.<sup>5</sup> According to Barilari, these measures can only be reached by introducing a new administrative culture that should express the change of mentality.<sup>6</sup>

He proposes the appointment of only one interlocutor in the tax administration, who handles the taxpayer's open cases. This simplification of the relationship with the taxpayer takes into account two groups of taxpayers (each consisting of both corporations and individuals): those who spontaneously pay their taxes and those who resist payment. The former should be encouraged; the latter should be discouraged by means of more frequent and more severe control.<sup>7</sup> Moreover, attention should be paid to a better citizen service.

<sup>2</sup> OECD *Forum on Tax Administration*, 'Annex 8.1 Netherlands – Horizontal Monitoring', in *Study into the Role of Tax Intermediaries*, Cape Town, January 2008, 79-82; Report of the Committee Horizontal Monitoring Tax and Customs Administration, 'Tax Supervision – made to measure. Flexible when possible, strict where necessary', June 2012, [http://download.belastingdienst.nl/belastingdienst/docs/tax\\_supervision\\_made\\_to\\_measure\\_tz0151z1fdeng.pdf](http://download.belastingdienst.nl/belastingdienst/docs/tax_supervision_made_to_measure_tz0151z1fdeng.pdf)

<sup>3</sup> Givati, Y., 'Resolving legal uncertainty: the unfulfilled promise of advance tax rulings', Discussion Paper No. 30, Cambridge (MA), Harvard Law School, June 2009, [http://www.law.harvard.edu/programs/olin\\_center/](http://www.law.harvard.edu/programs/olin_center/), 1.

<sup>4</sup> Barilari, A., *Le consentement à l'impôt*, Paris, Presses de sciences Po, 2000, 147 p.

<sup>5</sup> Barilari, A., *Le consentement à l'impôt*, Paris, Presses de sciences Po, 2000, 94.

<sup>6</sup> Barilari, A., *Le consentement à l'impôt*, Paris, Presses de sciences Po, 2000, 121.

<sup>7</sup> Bert, T. & Champsaur, P., *Mission 2003: Construire ensemble le service public de demain*, 6 janvier 2000, 130 p.

Among the suggestions are an extended range of communication media (telephone, internet) and ... the development of 'les procédures de rescrits' (i.e. tax rulings procedure).<sup>8</sup>

Barilari's book is part of a large-scale research commissioned by the French *ministère de l'Économie, des Finances et de l'Industrie* and the *ministère du Budget* (2000, 2002, 2004 and 2008). The analyses describe how the French tax administration functions and contain proposals on how to strengthen the relationship between the tax authorities and the taxpayer.<sup>9</sup> One of the recurrent propositions to improve the legal protection of the taxpayer was the development of the French tax ruling procedure.<sup>10</sup>

Givati confirms that considering the problem of legal uncertainty and its consequences given the magnitude of tax disputes, most tax scholars – worldwide – see the advance tax ruling procedure as an indispensable tool in the modern world of tax administration and compliance.<sup>11</sup> Indeed, giving an explanation – in accordance with the law – of the tax consequences of the taxpayer's future transactions fits the idea of a new mentality in the relationship between the tax authorities and the taxpayers.

There is a worldwide development of tax rulings.<sup>12</sup> In the light of globalisation, countries cannot lag behind in giving investors certainty about the tax consequences of their transactions. This is the only way in which a higher degree of compliance can be realized, in which tax evasive behaviour can be countered and in which the tax administration can focus on the fight against tax fraud. Rulings do not only support legal certainty, but also the consistent application of the tax law. They lead to a reduction of the number of legal disputes and to the improvement of the legal relationship between tax administration and taxpayer.<sup>13</sup> At the same time, the worldwide distributed measure of the ruling demonstrates that the relationship changing towards more mutuality, horizontalisation and even contractualisation between the tax administration and the taxpayer has become an inevitable instrument.

Initially – essentially and as a rule, advance tax rulings have nothing to do with aggressive tax planning. The staff working document of the European Commission accompanying the Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of

<sup>8</sup> Barilari, A., *Le consentement à l'impôt*, Paris, Presses de sciences Po, 2000, 126.

<sup>9</sup> For example: Conseil des impôts, *Les relations entre les contribuables et l'administration fiscale: 20ème rapport au Président de la République*, Paris, Direction des journaux officiels, 2002, 240 p.; Bert, T. & Champsaur, P., *Mission 2003: Construire ensemble le service public de demain*, 6 janvier 2000, 130 p.; Gibert, B., *Améliorer la sécurité du droit fiscal pour renforcer l'attractivité du territoire*, Paris, Ministère de l'Économie, des Finances et de l'Industrie, 2004, 89 p.; Fouquet, O., Burguburu, J., Lubek, D. & Guillemain, S., 'Améliorer la sécurité juridique des relations entre l'administration fiscale et les contribuables: une nouvelle approche', *Revue de droit fiscal* 2008, no 27, pp. 7-42.

<sup>10</sup> Gibert, B. & Daluzaeu, X., 'Further developments regarding the French ruling procedures', *European Taxation*, October 2009, pp. 456-463; Gibert, B., 'Developments regarding the French ruling procedures', *European Taxation*, March 2006, pp. 94-103.

<sup>11</sup> Givati, Y., 'Resolving legal uncertainty: the unfulfilled promise of advance tax rulings', Discussion Paper No. 30, Cambridge (MA), Harvard Law School, June 2009, [http://www.law.harvard.edu/programs/olin\\_center/](http://www.law.harvard.edu/programs/olin_center/), 1.

<sup>12</sup> Bernat, M., 'Advance Tax Rulings in the New EU Member States', *Tax Notes International* 2006, 475-497; Kawatra, G.K., 'Advance income tax rulings – developments across the globe', *Intertax* 1992, no 8-9, 508-513; Romano, C., *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System?*, Amsterdam, IBFD Doctoral Series, 2002, 387 e.v.; Romano, C., 'Private rulings systems in EU Member States: a comparative survey', *European taxation* 2001, 18-31; Romano, C., 'Introduction to the private rulings systems in EU countries', *LOF-Congress*, Groningen, LOF-Congress, 2000, 74-117; Sandler, D. & Romano, C. (eds.), *The International Guide to Advance Rulings*, Amsterdam, IBFD Publications; X., *Advance rulings*, in *Cahiers de droits fiscal international (IFA)*, Volume LXXXIVb, Den Haag/London/Boston, Kluwer Law International, 1999, 674 p.; X., 'Advance Pricing Agreements', *Tax Planning International Review* 1999, no 4, 9-14; X., 'Availability and effect of host country transfer pricing administrative rulings', *The Tax Management International* 1992, no 4, 1-24; X., 'Tax administration private rulings', *The Tax Management International Forum* 1987, vol. 8, no 1, 1-36; X., *Advance rulings by the tax authorities at the request of a taxpayer*, in *Cahiers de droit fiscal international (IFA)*, Volume Lb, London, IFA, 1965, 277 p.

<sup>13</sup> Fouquet, O., Monsellato, G. & Bouchard, J.-Cl., 'Vers de nouveaux rapports entre l'administration fiscale et le contribuable: quelle sécurité juridique et quelle confiance?', *Revue de droit fiscal* 2008, no 15, 12, no 3.

information in the field of taxation<sup>14</sup> confirms that tax rulings are not intrinsically problematic. Granting tax rulings is neither illegal nor against Treaties.

Even when multinationals submit a ruling application, it must be kept in mind that rulings are a very important instrument to obtain legal certainty and to realise tax compliance. Decision makers should deal carefully with this precious instrument that absolutely should not disappear.

### **1.3. ... within the limits of the law, but with respect for taxpayer's rights**

#### **1.3.1. Legal or policy limits on the international, European and national level**

Of course, tax authorities and taxpayers are confronted with legal or policy limits at several levels. Tax rulings are meant to be in accordance with those limits. We can consider three levels of limitations that should be taken into account: the international, the European Union and the national level.

All these legal or policy limitations – legally binding or not – contribute to an intrinsically higher degree of transparency and even to a fair tax ruling system in accordance with the reasons of its existence and with respect to the taxpayer's rights.

Tax rulings are allowed as far as the tax administration takes legal limits into account. After all, tax rulings, in principle, do not establish taxes. Tax provisions are and remain the legal basis upon which taxes are due. In tax rulings, tax authorities give an explanation to the taxpayer on how they will apply tax law in his particular situation. This is admissible as long as the tax authorities, prior to applying tax law, do not interpret the law itself more flexibly or more strictly than the legislator had in mind.

##### **a. International level**

#### **- OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (including updates)**

At the international level, tax authorities have to take into account the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations when issuing an advance pricing agreement.<sup>15</sup> The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations were originally approved by the OECD Council in 1995. They were completed with additional guidance on cross-border services, intangibles, costs contribution arrangements and advance pricing arrangements in 1996-1999. In the 2009 edition, a few amendments were made to Chapter IV, primarily to reflect the latest developments on dispute resolution. In 2010, Chapters I-III were substantially revised with the addition of new guidance on the selection of the most appropriate transfer pricing method to the circumstances of the case, on how to apply transactional profit methods (the transactional net margin method and the profit split method) and on how to perform a comparability analysis. Furthermore, Chapter IX was added, dealing with the transfer pricing aspects of business restructurings. There has been an update with the publication of the Guidance of Transfer Pricing Documentation (Chapter V of the TP Guidelines) and

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<sup>14</sup> European Commission staff working document. Technical analysis of focus and scope of the legal proposal, accompanying the Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of information in the field of taxation, {COM(2015) 135 final}, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_6\\_0.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_6_0.pdf)

<sup>15</sup> OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, <http://www.oecd.org/daf/inv/mne/transfer-pricing-guidelines.htm>.

Country-by-Country Reporting<sup>16</sup> and the Guidance on Transfer Pricing Aspects of Intangibles (with amendments on Chapters I-II and VI of the TP Guidelines) on 16 September 2014.<sup>17</sup>

#### - OECD Report on Harmful Tax Competition

In addition, in 1996 the OECD took steps against harmful tax competition. The Committee on Fiscal Affairs created the Special Sessions on Tax Competition in 1997. The report entitled '*Harmful Tax Competition. An emerging global issue*' was accepted in April 1998.<sup>18</sup> The Report is intended to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally.<sup>19</sup> Transparency and international co-operation through exchange of information are important.

According to the report on harmful tax competition, not every tax competition is harmful. Four key factors assist in identifying harmful preferential tax regimes: (a) the regime imposes a low or zero effective tax rate on the relevant income; (b) the regime is ring-fenced; (c) the operation of the regime is nontransparent; (d) the jurisdiction operating the regime does not effectively exchange information with other countries.<sup>20</sup> Other factors that can assist in identifying harmful preferential tax regimes are an artificial definition of the tax base, the failure to adhere to international transfer pricing principles, foreign source income exempt from residence country tax, negotiable tax rate or tax base, the existence of secrecy provisions, access to a wide network of tax treaties, regimes which are promoted as tax minimisation vehicles and finally the regime encourages purely tax-driven operations or arrangements.<sup>21</sup>

With respect to the lack of transparency, the OECD Report on Harmful Tax Competition mentions the favourable administrative rulings allowing a particular sector to operate under a lower effective tax environment than other sectors.

In view of the discussion on tax rulings and tax transparency, it is interesting to quote a part of the report:

'The lack of transparency in the operation of a regime will make it harder for the home country to take defensive measures. To be deemed transparent in terms of administrative practices, a tax regime's administration should normally satisfy both of the following conditions.

First, it must set forth clearly the conditions of applicability to taxpayers in

<sup>16</sup> OECD/G20 Base Erosion and Profit Shifting Project, Action 13: Country-by-Country Reporting. Implementation Package, 2015: <http://www.oecd.org/tax/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf>.

<sup>17</sup> [http://www.oecd-ilibrary.org/taxation/guidance-on-transfer-pricing-documentation-and-country-by-country-reporting\\_9789264219236-en](http://www.oecd-ilibrary.org/taxation/guidance-on-transfer-pricing-documentation-and-country-by-country-reporting_9789264219236-en) and [http://www.oecd-ilibrary.org/taxation/guidance-on-transfer-pricing-aspects-of-intangibles\\_9789264219212-en](http://www.oecd-ilibrary.org/taxation/guidance-on-transfer-pricing-aspects-of-intangibles_9789264219212-en).

<sup>18</sup> OECD, *Harmful Tax Competition. An emerging global issue*, Paris, OECD, 1998, <http://www.oecd.org/tax/transparency/44430243.pdf>, 82 p. See also: Avi-Yonah, R.S., 'The OECD Harmful Tax Competition Report: A 10<sup>th</sup> Anniversary Retrospective', University of Michigan Legal Working Paper Series. Working Paper 89, 2008, <http://law.bepress.com/umichlwps/olin/art89>; McLure Jr., Ch.E., 'Will the OECD Initiative on Harmful Tax Competition Help Developing and Transition Countries?', *IBFD-Bulletin* 2005, 90-98; Montegriffo, P., 'Harmful tax competition and the future of tax planning', *ITPA Journal* 2000, 67-89; Weiner, J.M. & Ault, H.J., 'The OECD's Report on Harmful Tax Competition', *National Tax Journal* 1998, no 3, 601-608.

<sup>19</sup> OECD, *Harmful Tax Competition. An emerging global issue*, Paris, OECD, 1998, <http://www.oecd.org/tax/transparency/44430243.pdf>, 8.

<sup>20</sup> OECD, *Harmful Tax Competition. An emerging global issue*, Paris, OECD, 1998, <http://www.oecd.org/tax/transparency/44430243.pdf>, 25-30.

<sup>21</sup> OECD, *Harmful Tax Competition. An emerging global issue*, Paris, OECD, 1998, <http://www.oecd.org/tax/transparency/44430243.pdf>, 30-34.

such a manner that those conditions may be invoked against the authorities; second, details of the regime, including any applications thereof in the case of a particular taxpayer, must be available to the tax authorities of other countries concerned.

Regimes which do not meet these criteria are likely to increase harmful tax competition since non-transparent regimes give their beneficiaries latitude for negotiating with the tax authorities and may result in inequality of treatment of taxpayers in similar circumstances.

A lack of transparency may arise because:

- Favourable administrative rulings (e.g., regulatory, substantive, and procedural rulings) are given, allowing a particular sector to operate under a lower effective tax environment than other sectors. As an example of a favourable administrative ruling, tax authorities may enter into agreements with a taxpayer or may agree to issue advance tax rulings in requested cases. However, where these administrative practices are consistent with and do not negate or nullify statutory laws, they can be viewed as a legitimate and necessary exercise of administrative authority. To assure equality in treatment, the ruling criteria should be well-known or publicised by the authority granting the ruling and available on a non-discriminatory basis to all taxpayers.

- Special administrative practices may be contrary to the fundamental procedures underlying statutory laws. This may encourage corruption and discriminatory treatment, especially if the practices are not disclosed. Such practices can also make it more difficult for other countries to enforce their tax laws. Thus, a regime where the tax rate and base are not negotiable, but where administrative practices and enforcement do not conform with the law or do not stipulate the conditions of applicability, may be considered as potentially harmful.

- If the general domestic fiscal environment is such that the laws are not enforced in line with the domestic law, this could make an otherwise legitimate regime harmful. Thus, although in general the domestic fiscal environment would not make an otherwise legitimate regime harmful, it may be a factor to evaluate in conjunction with other factors. A specific example of this issue is where the tax authorities deliberately adopt a lax audit policy as an implicit incentive to taxpayers not to comply with the tax laws. Such behavior may give these taxpayers a competitive advantage.<sup>22</sup>

Subsequently, the OECD report contains a detailed list of recommendations to counter the harmful tax competition. These recommendations are divided into the following three categories: recommendations concerning domestic legislation, recommendations concerning tax treaties and recommendations for intensification of international cooperation.<sup>23</sup>

One recommendation deals with rulings:

'That countries, where administrative decisions concerning the particular position of a taxpayer may be obtained in advance of planned

<sup>22</sup> OECD, *Harmful Tax Competition. An emerging global issue*, Paris, OECD, 1998, <http://www.oecd.org/tax/transparency/44430243.pdf>, 28-29.

<sup>23</sup> OECD, *Harmful Tax Competition. An emerging global issue*, Paris, OECD, 1998, <http://www.oecd.org/tax/transparency/44430243.pdf>, 37-59.

transactions, make public the conditions for granting, denying or revoking such decisions.

The absence of details concerning certain administrative practices, through which taxpayers' positions are determined, in particular on issues such as the arm's length value of certain services or the allocation of profits or losses between associated enterprises or between head offices and their permanent establishments, contributes to making a tax system non-transparent. This results in distortions in relation to States which, under their legal system, are required to apply their tax regimes in the same way vis-à-vis all taxpayers.

The ignorance of the existence of a regime for obtaining administrative decisions on specific planned transactions, or of the conditions for granting or denying such decisions, may result in unequal treatment of 45 taxpayers since the lack of public information on this regime may put taxpayers in different positions when determining their tax situation. Greater transparency concerning the conditions for eligibility to a particular regime will therefore favour a greater equality of treatment of taxpayers in a similar position.

The publication, in a way that protects taxpayer confidentiality, of the substantive and procedural conditions for granting or denying individual tax rulings, ensures a greater transparency of countries' tax policies concerning certain activities that may easily be re-located, and is essential to the application of measures to prevent harmful tax competition from being developed individually or collectively by countries. Without it, measures which are now "transparent" may well be transformed into non-transparent regimes.<sup>24</sup>

Following the report on Harmful Tax Competition, the OECD created a special forum, the Forum on Harmful Tax Practices. Furthermore, together with cooperative tax havens the Forum has produced a Model Tax Agreement on Exchange of Information in Tax Matters.<sup>25</sup> Afterwards, progress reports were produced in 2001, 2004 and 2006 on the state of affairs in the 33 countries followed by the OECD.<sup>26</sup> On the basis of the factors in the 1998 report, the OECD identified 47 potentially harmful tax measures in 2000. In 2004, it reported that 18 of these had been abolished and that 14 were being amended to be abolished. Upon further research, 13 measures were not considered harmful.<sup>27</sup> In 2006, the OECD had only three harmful measures (in Belgium, Luxembourg and Switzerland) left for consideration, on which the Committee on Fiscal Affairs had not come to a conclusion in 2004. The report has also studied a few newly introduced arrangements since 2000: both the Dutch ATR/APA-arrangement of 2001 and the Belgian procedure regarding advance decisions in tax matters are not considered harmful by the OECD.<sup>28</sup>

The most important conclusion of the international limitation on tax rulings is that the OECD asks for more transparency and equal treatment of all taxpayers by the publication

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<sup>24</sup> OECD, *Harmful Tax Competition. An emerging global issue*, Paris, OECD, 1998, <http://www.oecd.org/tax/transparency/44430243.pdf>, 44, 61.

<sup>25</sup> [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/harmful\\_tax\\_practices/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm).

<sup>26</sup> OECD, *The OECD's Project on Harmful Tax Practices: 2006 update on Progress in Member Countries*, CTPA, 2006, 6 p.; OECD, *The OECD's Project on Harmful Tax Practices: the 2004 Progress Report*, OECD, 2004, 18 p.; OECD, *The OECD's Project on Harmful Tax Practices: the 2001 Progress Report*, OECD, 2001.

<sup>27</sup> OECD, *The OECD's Project on Harmful Tax Practices: the 2004 Progress Report*, OECD, 2004, 7-9; Jaratt, O., 'Harmful Tax Practices', *The Tax Journal* May 2004, 15.

<sup>28</sup> OECD, *The OECD's Project on Harmful Tax Practices: 2006 update on Progress in Member Countries*, CTPA, 2006, 6.

of the conditions for granting, refusing and revoking tax decisions.

However, the OECD Report on Harmful Tax Competition also paid attention to the lack of effective exchange of information between countries:<sup>29</sup>

'Lack of effective exchange of information

The ability or willingness of a country to provide information to other countries is a key factor in deciding upon whether the effect of a regime operated by that country has the potential to cause harmful effects. A country may be constrained in exchanging information, for the purpose of the application of a tax treaty as well as for the application of national legislation, because of secrecy laws which prevent the tax authorities from obtaining information for other countries on taxpayers benefiting from the operation of a preferential tax regime. In addition, even where there are no formal secrecy laws, administrative policies or practices may impede the exchange of information. For example, the country may determine as a matter of administrative policy that certain transactions or relations between an enterprise and its customers are a business secret which need not be disclosed under Article 26 paragraph 2 (c) of the OECD Model Tax Convention, or the country with the preferential tax regime may simply be uncooperative with other countries in providing information. Such laws, administrative policies, practices or lack of co-operation may suggest that the preferential tax regime constitutes harmful tax competition.

The limited access that certain countries have to bank information for tax purposes (e.g., because of bank secrecy rules) is increasingly inadequate to detect and to prevent the abuse of harmful preferential tax regimes by taxpayers. The Committee has commissioned a survey of country practices regarding access to bank information for tax purposes.

Exchange of information may be a constraint in situations where a non-transparent regime allows the tax authorities to give a prior determination to an individual taxpayer and where that tax authority does not inform the foreign tax authority affected by such a decision. This failure to notify the foreign tax authority may curtail the ability of that tax authority to enforce effectively its rules.

Other factors that reflect a difficulty in obtaining the information needed to enforce statutory laws, and which may make a preferential regime harmful, include the absence of an annual general audit requirement for companies, no requirement for a public register of shareholders and the use of shares and financial instruments issued in bearer form.<sup>30</sup>

b. European Union level

At the EU level, we can think of the following EU policy initiatives that relate to information exchange between tax authorities and the aspect of rulings in the area of taxation:

- Code of Conduct for Business Taxation<sup>31</sup>
- Model Instruction<sup>32</sup>

<sup>29</sup> Other papers will focus on this topic of exchange of information.

<sup>30</sup> OECD, *Harmful Tax Competition. An emerging global issue*, Paris, OECD, 1998, <http://www.oecd.org/tax/transparency/44430243.pdf>, 29-30.

<sup>31</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999 [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf).

<sup>32</sup> Document 10903/12 FISC 77, Brussels, 11 June 2012, 6; Document 10608/14 FISC 95.



- Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation
- CCCTB proposal<sup>33</sup>
- Action plan to strengthen the fight against tax fraud and tax evasion<sup>34</sup>
- State aid rules<sup>35</sup>

Tax rulings must be delivered within the framework of all these initiatives. All these EU policy initiatives are described in the European Commission Staff Working Document accompanying the proposal for a Council Directive amending Directive 2011/16/EU.<sup>36</sup>

This paper will therefore highlight a few interesting initiatives to infer the role of the EU with respect to tax rulings.

#### - EU Guidelines for advance pricing agreements

Within the EU, the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises<sup>37</sup> was prepared by the EU Joint Transfer Pricing Forum (JTPF) that was set up in 2002.<sup>38</sup> The most interesting tool of this Forum in the sphere of tax rulings is the communication of the European Commission on the non-enforceable Guidelines for advance pricing agreements in the EU in 2007.<sup>39</sup>

On 5 June 2007, the European Council endorsed these *Guidelines* for APAs and pointed out the Member States' commitment to follow them and to implement them in their national legislations to the extent it was legally possible.<sup>40</sup> Nevertheless, the so-called EU APA Guidelines are a soft law instrument. The Member States were even requested to report annually at the Commission on all measures taken in response to these APA Guidelines and on the implementation of the APA Guidelines in practice.

The EU APA Guidelines aim to prevent transfer pricing disputes and associated double taxation from arising, in the first place by laying down how an efficient APA process should work. The Guidelines provide details of how some specific problems could be resolved. These guidelines focus on bi- and multilateral APAs, because they are considered as the most efficient tools to prevent double taxation. However, the Guidelines also include a section on unilateral APAs. They provide examples of the necessary time frame and the types of areas which would need to be covered by the APA. These guidelines are based on the best practice identified by the Joint TP Forum.<sup>41</sup>

<sup>33</sup> [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/common\\_tax\\_base/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm).

<sup>34</sup> European Commission (2012), Communication from the Commission to the European Parliament and the Council – An action plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final.

<sup>35</sup> Article 107 of the Treaty on the Functioning of the European Union.

<sup>36</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_6\\_0.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_6_0.pdf), 8-12.

<sup>37</sup> Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), 2006/C 176/01, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:42006X0728\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:42006X0728(01)).

<sup>38</sup> The EU Joint Transfer Pricing Forum (JTPF) assists and advises the European Commission on transfer pricing tax matters: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm).

<sup>39</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, (EU APA Guidelines) {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DCC0071>.

<sup>40</sup> Press Release, 10319/07.

<sup>41</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DCC0071>.

According to the Commission, these Guidelines constitute the basis of APA procedures in the entire EU.<sup>42</sup> Following its instructions, the Member States will promote the use of APAs, which will lead to fewer conflicts and fewer cases of double taxation. This will help remove tax limitations and realize the principal goals of the unified market: a better investment climate, a more competitive business climate, growth and jobs.<sup>43</sup>

Hence, these APA Guidelines deal with the organization of an APA procedure, the entry to the APA programme, fees, complexity thresholds, documentation requirements, the conduct of the APA process (with a pre-filing stage, a formal application, the evaluation and negotiation of the APA, formal agreement), critical assumptions, etc.<sup>44</sup>

Appendix E of the APA Guidelines mentions the details that are necessary in an APA agreement:<sup>45</sup>

- the duration of the APA and day of entry into force;
- details of the methodology acceptable for determining transfer pricing and the critical assumptions (see appendix F) that must be followed for the APA to apply;
- an agreement that the APA will be binding on the tax administrations involved;
- an agreement of how the APA is to be monitored;
- an agreement of what documentation is to be maintained throughout the APA to allow monitoring to take place, for example an annual report;
- any agreement on any retrospective treatment;
- any circumstances which will require the APA to be revised;
- any circumstances which will result in the APA being rescinded prospectively or even retrospectively (for instance if false information has been provided)

The Member States judge for themselves if a taxpayer should pay a fee. Such fees should not be a discouragement to submit an APA request. The same goes for complexity thresholds, which give an indication of an APA's suitability and should not be compulsory. They have to be applied consequently for all taxpayers and are checked during a prefilling meeting.<sup>46</sup>

According to the EU APA Guidelines, the publication of some statistical information on APAs by each tax administration would be useful. The EU APA Guidelines even mention 'that with the Code of Conduct for Business Taxation, Member States have committed themselves to spontaneously exchange details of concluded unilateral APAs. The Exchange of Information should be made to any other tax administration directly concerned by the unilateral APA and should be done as swiftly as possible after the conclusion of the APA'.<sup>47</sup>

One of the goals mentioned in the work programme 2011-2015 of the EU JTPF is monitoring previous achievements. Inter alia, the Guidelines on APAs are meant here. Monitoring will be conducted with the aim of establishing to what extent the previous works of the JTPF are implemented, to evaluate their effectiveness and to consider how

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<sup>42</sup> Van Herksen, M., 'There's an APA in your future!', *International Tax Planning Transfer Pricing* 2007, no 5, 3.

<sup>43</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>, 8.

<sup>44</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>, 25.

<sup>46</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

<sup>47</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

improvements might be made. With respect to the APA Guidelines, this means a review of APA policy/programmes in the Member States (based on private sector practical experience).<sup>48</sup>

The EU JTPF monitors statistics of the number of APAs in the Member States.<sup>49</sup> The staff working document of the European Commission accompanying the Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of information in the field of taxation<sup>50</sup> mentions that according to this information, at the end of 2013, 9 Member States did not have any advance pricing arrangements in force, 10 Member States had between 1 and 25, 6 Member States between 30 and 75, and 1 Member State more than 100 advance pricing arrangements. Across the EU, 2 out of 3 advance pricing arrangements are unilateral arrangements, 1 out of 3 is a bi- or multilateral. It is interesting to note that where cross-border transactions include non-EU countries, advance pricing arrangements appear more likely to be bi- or multilateral than transactions within the EU. For advance pricing arrangements only within the EU, out of the 370 arrangements in force around 310 are unilateral and 60 bi- or multilateral. In contrast, the 180 arrangements in force which include non-EU countries are split almost evenly between unilateral (90) and bi- and multilateral arrangements (87).

#### - EU Code of Conduct for Business Taxation

The Code of Conduct for Business Taxation was set out in the conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 December 1997.<sup>51</sup>

The EU Code of Conduct for Business Taxation is a voluntary political commitment taken by the Member States to comply with the principles of fair tax competition and to refrain from harmful tax measures.<sup>52</sup> The Code is not a legally binding instrument nor affects the individual Member States' competences.

However, it clearly does have political force. By adopting this Code, the Member States have undertaken to 'roll back' existing tax measures that constitute harmful tax competition and refrain from introducing any such measures in the future ('standstill').<sup>53</sup>

The Resolution that was adopted on a Code of Conduct for Business Taxation by the Council, provided for the establishment of a Group within the framework of the Council to assess tax measures that may fall within the Code.

<sup>48</sup> EU JOINT TRANSFER PRICING FORUM JTPF work programme 2011-2015, JTPF/016/2011/EN, June 2011, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf\\_work\\_programme\\_2011-2015.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf_work_programme_2011-2015.pdf).

<sup>49</sup> EU JOINT TRANSFER PRICING FORUM Statistics on APAs at the end of 2012, JTPF/013/2013/EN, August 2013, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/fin\\_al\\_apa\\_statistics\\_2012\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/fin_al_apa_statistics_2012_en.pdf); EU JOINT TRANSFER PRICING FORUM Statistics on APAs at the end of 2013, JTPF/007/2014/EN, October 2014, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/fin\\_al\\_apa\\_statistics\\_2013\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/fin_al_apa_statistics_2013_en.pdf).

<sup>50</sup> Commission staff working document. Technical analysis of focus and scope of the legal proposal, accompanying the Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of information in the field of taxation, {COM(2015) 135 final}, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_60.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_60.pdf), 7.

<sup>51</sup> Council Conclusions of the ECOFIN Council Meeting of 1 December 1997 concerning taxation policy (98/C 2/01), *PBI. EG* 1998, no C-2/1-6, [http://ec.europa.eu/taxation\\_customs/resources/documents/coc\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/coc_en.pdf).

<sup>52</sup> Council Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy (98/C 2/01), Communication from the Commission to the Council and the European Parliament, *A package to tackle harmful tax competition in the European Union*, COM(97) 564 final, 12 p.; Rainer, A., 'The E.C. Code of Conduct for Business Taxation', *Tax Planning International: European Union Focus* 1998, 15; Kiegebeld, B.J., *Harmful tax competition in the European Union: Code of Conduct, countermeasures and EU Law*, in EPS Brochure Series, Deventer, Kluwer, 2004, 160 p..

<sup>53</sup> Council Conclusions of the ECOFIN Council Meeting of 1 December 1997 concerning taxation policy (98/C 2/01), *PBI. EG* 1998, no C-2/1-6, [http://ec.europa.eu/taxation\\_customs/resources/documents/coc\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/coc_en.pdf), 2/4.

The Code of Conduct Group was set up by ECOFIN on 9 March 1998, and met first on 8 May 1998.<sup>54</sup>

The British Paymaster General Mrs. Primarolo was elected president of the Group.<sup>55</sup> After her, both the Group and the report were not only called the 'Code of Conduct Group/Report', but also 'Primarolo Group/Report'.

The Code of Conduct Group selects and reviews the tax measures which fall within the scope of the Code of Conduct for Business Taxation for assessment and oversees the provision of information on those measures.

The Commission searched for those measures (including both laws or regulations and administrative practices) which affect, or may affect, in a significant way the location of business activity in the EU.<sup>56</sup> Therefore, the first investigation studied whether there was a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question.<sup>57</sup>

When assessing whether such measures are harmful, account should be taken of, inter alia: an effective level of taxation which is significantly lower than the general level of taxation in the country concerned, whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.<sup>58</sup>

The Group decided to divide the initial list into the following five categories: intra group services, financial services and off-shore companies, other sector-specific regimes, regional incentives, and other measures. A further category covered dependent or associated territories.<sup>59</sup> For each category, a separate subcommittee was established, that studied whether the measures are actually harmful.

According to Burgers a number of differences between factors indicating harmful tax measures can be detected.<sup>60</sup> In contrast to the OECD, the EU does not regard the exclusive granting of the tax facility as ring fencing. Furthermore, the OECD considers as ring fencing tax facilities that are only granted to corporations which do not operate in the internal market when the reason for it is an implicit or explicit prohibition, while the EU criteria also consider it as ring fencing in the absence of such a prohibition. Moreover, it should be remarked that the EU Code of Conduct does not apply to the non-EU Member States which are covered by the OECD report.

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<sup>54</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf).

<sup>55</sup> T. VILLIERS, *European Tax Harmonisation. The Impending Threat*, Center for Policy Studies, 2001, 21-22.

<sup>56</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 2.

<sup>57</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 2; Rainer, A., 'The E.C. Code of Conduct for Business Taxation', *Tax Planning International: European Union Focus* 1998, 14.

<sup>58</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 3.

<sup>59</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, 6.

<sup>60</sup> Burgers, I.J.J., 'Schadelijke belastingconcurrentie: het Nederlandse rulingbeleid exit?', in *LOF-Congress*, Groningen, 2000, 61.

The report strongly emphasizes the exchange of information and the so-called tax havens, issues not discussed by the EU Code of Conduct.<sup>61</sup>

On 23 November 1999, the Group sent its report on the code of conduct for business taxation to the ECOFIN Council of 29 November 1999.<sup>62</sup>

The criteria determining harmful tax measures have been conceived in a large sense by the Code of Conduct, which initially led to not less than 250 measures being considered potentially harmful. Finally, 66 measures were considered harmful.

Member States and their dependent and associated territories have now introduced revised or replacement measures in substitution for the 66 measures. For beneficiaries of those regimes on or before 31 December 2000, a 'grand-fathering' clause has been provided under which benefits have to lapse no later than 31 December 2005, independently of whether or not they were granted for a fixed period. Some extensions of benefits for defined periods of time beyond 2005 have been agreed for measures in Member States and their dependent and associated territories. Since then, the Code of Conduct Group has been monitoring standstill and the implementation of rollback, and reported regularly to the Council.

In response to the Code of Conduct, the Netherlands have transformed their system of standard and non-standard rulings to the current ATR/APA-regulation in 2001, which has been marked not harmful by the OECD meanwhile.<sup>63</sup> This led Dutch scholars to an interesting discussion on the publication and transparency of tax rulings.

Stevens did not agree with the judgment of the Code of Conduct. According to this author, the group has misunderstood the Dutch ruling system, which on the contrary led to greater transparency and legal certainty.<sup>64</sup> Engelen did not agree either on the view that the Dutch ruling system would be harmful in the sense of the Code of Conduct.<sup>65</sup> The latter author expresses his reservations with the requirement of transparency. According to Engelen, the question can be asked whether the former ruling policy was sufficiently transparent. Even though the ruling policy is published and the parliament is informed about it, the requests that are under the jurisdiction of local inspectors (in stead of the ruling team in Rotterdam) remain secret. These individual cases regarding, among other things, the arm's length principle are not published (anonymously). Wattel wonders whether the Code of Conduct demands that every individual ruling is published anonymously (so-called 'americanization').<sup>66</sup> Engelen agrees with the State Secretary of Finance of the Netherlands who thinks that the reluctance in individual cases does not compromise the disclosure and transparency of the Dutch ruling policy in general.

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<sup>61</sup> Burgers, I.J.J., 'Schadelijke belastingconcurrentie: het Nederlandse rulingbeleid exit?', in *LOF-Congress*, Groningen, 2000, 61.

<sup>62</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 1. See also: Bidgland, N., 'The EU Code of Conduct to eliminate harmful business tax regimes: the future', *Tax Planning International: European Union Focus* 2006, no 1, 8-11; Maclachlan, J.E. & Chmiel, D., 'The Drive against 'Harmful' Tax Competition: the E.U. Commission's Code of Conduct on Direct Taxation and Related Developments', *Tax Planning International: European Union Focus* 2000, vol. 2, no 2, 3; Rainer, A., 'The E.C. Code of Conduct for Business Taxation', *Tax Planning International: European Union Focus* 1998, 13.

<sup>63</sup> Meussen, G. & Velthuisen, E., 'APAs and ATRs: The new Dutch regime in a European perspective', *EC Tax Review* 2002, 7.

<sup>64</sup> Stevens, L., "Ruling policy increases administrative transparency", *EC Tax Review* 2001, no 2, 70-71.

<sup>65</sup> Engelen, F.A., "Belastingconcurrentie binnen de EU. Over fiscale beleidsconcurrentie, fiscale marktdistorsies en fiscale staatssteun", *MBB* 1999, no 1, 31.

<sup>66</sup> Wattel, P.J., "Belastingconcurrentie, staatssteun, de EG-gedragscode en de Nederlandse CFM", *Nederlands Tijdschrift voor Europees Recht* 1998, 24.

He does concede that the individual cases that are treated by local inspectors and that remain outside of the communication and publication of the ruling policy, are susceptible to the presumption of being a harmful tax measure in the sense of the Code of Conduct.<sup>67</sup>

Regarding the scope of the mandate of the Code of Conduct Group, some Member States expressed interest in strengthening its role in order to better fight against harmful taxation and BEPS, whilst others would prefer to focus on its existing tasks.<sup>68</sup> The Group decided to dedicate the next meeting of the Code of Conduct Group, preferably in July 2015, to the future of the Code of Conduct Group.<sup>69</sup> In any case, it is certain that the report of the Code of Conduct Group of 1999 was watched closely and followed up by both the Member States (in eliminating harmful tax measures) and the European Commission (in ascertaining where an investigation into Fiscal State Aid could be done). This Group has set a lot in motion. It is conceivable that history repeats itself.

#### - Model Instruction

In 2012, the Code of Conduct Group reviewed developments in Member States' transparency of procedures for providing advance certainty and the publication of individual rulings suitable for horizontal application.<sup>70</sup> Unfortunately, there is no public document available. With a view to stimulating spontaneous exchange of information in relation to specific cross border rulings, the Group looked at the Member States' internal framework for the spontaneous exchange of information and suggested that the Commission's Committee on Administrative Cooperation for Taxation analyse this matter further, with a view to a possible development of a Model Instruction that could be used as a reference by the Member States for internal application and follow-up.<sup>71</sup> The Code of Conduct Group agreed on the Model Instruction in its report of June 2014.<sup>72</sup> The Model Instruction covers cross-border rulings and unilateral advance pricing arrangements.

A questionnaire was circulated to the Member States to receive information on measures taken concerning the agreed Model Instruction for spontaneous exchange of cross-border rulings and unilateral APAs. The responses show that some Member States have not yet started with the implementation of the Model Instruction. The Group emphasised the need to ensure effective implementation of the approved Model instruction by the end of 2015.<sup>73</sup>

Regarding the issues of improvements in the field of transparency of procedures, the Group agreed on the following guidance: 'To the extent that it accommodates the advance interpretation or application of a legal provision to a specific situation or transaction of an individual taxpayer, the underlying procedures should be embedded in a transparent legal and administrative framework. Where this advance interpretation or application is suitable for horizontal application in similar situations, this interpretation or application should be published or be reflected in update guidance, or be made otherwise publicly available'.<sup>74</sup>

<sup>67</sup> Engelen, F.A., 'Belastingconcurrentie binnen de EU. Over fiscale beleidsconcurrentie, fiscale marktdistorsies en fiscale staatssteun', *MBB* 1999, no 1, 32.

<sup>68</sup> ECOFIN Report to the European Council on Tax issues, Note from the General Secretariat of the Council to Delegations, FISC 81 ECOFIN 529 CO EUR-PREP 29, <http://data.consilium.europa.eu/doc/document/ST-10161-2015-INIT/en/pdf>, 27.

<sup>69</sup> Report of the Code of Conduct Group (Business Taxation) to the Permanent Representatives Committee/Council, 11 June 2015, DOC 9620/15 FISC 60 ECOFIN 443, <http://data.consilium.europa.eu/doc/document/ST-9620-2015-INIT/en/pdf>, 5.

<sup>70</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_60.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_60.pdf), 8.

<sup>71</sup> Document 10903/12 FISC 77, Brussels, 11 June 2012, 6.

<sup>72</sup> Document 10608/14 FISC 95.

<sup>73</sup> Report of the Code of Conduct Group (Business Taxation) to the Permanent Representatives Committee/Council, 11 June 2015, DOC 9620/15 FISC 60 ECOFIN 443, <http://data.consilium.europa.eu/doc/document/ST-9620-2015-INIT/en/pdf>, 4.

<sup>74</sup> Document 10033/10 FISC 47, Brussels, 25 May 2010, 11.

Hence, the OECD and the EU ask for more transparency of tax rulings. Why, today – in the Proposal for a Council Directive amending Directive 2011/16/EU – focus only on the exchange of information regarding tax rulings between tax authorities and the European Commission, and not think about further strengthening EU provisions for the publication of national tax rulings procedures and even the issued tax rulings themselves? Of course, this should happen with respect for the taxpayer's rights and professional secrecy.

#### - Fiscal State Aid

Finally, at the EU level of limits regarding tax rulings, the European ban on fiscal state aid should be mentioned. Indeed, a lack of transparency and publication of tax rulings weaken the presumption of fiscal state aid. Therefore, this paper advocates the encouragement of the EU Member States to publish the procedure rules and even the individual tax rulings on a regular basis.<sup>75</sup>

#### c. National level

Many national provisions (even Constitutions) of the EU Member States guarantee the principle of legality, the public order character of tax law, but also the principle of equality.

#### - Principle of legality

Tax exemptions or reliefs may only be introduced by law. It is a common good in the EU that taxpayers are not entitled to rely on tax rulings that violate tax legislation. It is clear that the principle of legality is a generally accepted and widespread principle.

#### - Principle of equality

Where the tax authorities have a wider margin of appreciation, the principle of equality must be viewed as a supplementary requirement of legitimacy or as a general principle of proper administration. It is essential for the invocation of the principle of equality that the tax ruling is made sufficiently available so that a similarity test can be applied. A necessary first step in the application of the principle of equality is publishing the procedural steps and the general policy on granting, refusing and revoking tax rulings. Based on the principle of equality, tax authorities are not allowed to deviate randomly from administrative (legal) policy rules. Moreover, equality before the law is guaranteed by article 14 of the ECHR as well.

Third parties must be able to invoke the principle of equality as a principle of proper administration as well. For this reason, tax authorities must guarantee the accessibility and the uniformity of their policy to rule and even of the individual tax rulings. Supervision by all taxpayers and a minimal degree of disclosure are crucial elements for the credibility and perception of tax rulings, especially in the current tax ruling context where justice must not only be done, but also be seen to be done.

#### 1.3.2. Taxpayers' rights

According to Bentley there is no human right to rulings for the taxpayer, but it is a best practice in most of the legal systems worldwide that the tax administration delivers a ruling. Therefore, the author includes the development of a legal framework for binding advance tax rulings, comprising the possibility of appeal, in his Model of Taxpayers' Rights.<sup>76</sup>

In 1990, the OECD's Committee of Fiscal Affairs Working Party Number 8 published a document entitled 'Taxpayers' rights and obligations – A survey of the legal situation in

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<sup>75</sup> The paper of Raymond Luja deals with this topic.

<sup>76</sup> Bentley, D., *Taxpayers' Rights. Theory, Origin and Implementation*, Alphen aan den Rijn, Kluwer Law International, 2007, 349.

OECD countries'.<sup>77</sup> A Taxpayers' Charter was proposed in the practice note of the 'Taxpayers' rights and obligations'.<sup>78</sup>

The European Commission adopted an Action Plan which details concrete proposals to strengthen the fight against tax fraud and tax evasion on 6th December 2012.<sup>79</sup> On 18 March 2015, the European Commission launched the Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of information in the field of taxation.<sup>80</sup>

One of the 34 measures contained in the Action Plan is the development of a European Taxpayer's Code which is described as follows (action 17):

'In order to improve tax compliance, the Commission will compile good administrative practices in Member States to develop a taxpayer's code setting out best practices for enhancing cooperation, trust and confidence between tax administrations and taxpayers, for ensuring greater transparency on the rights and obligations of taxpayers and encouraging a service-oriented approach.

The Commission will launch a public consultation on this at the beginning of 2013. By improving relations between taxpayers and tax administrations, enhancing transparency of tax rules, reducing the risk of mistakes with potentially severe consequences for taxpayers and encouraging tax compliance, encouraging Member States' administrations to apply a taxpayer's code will help to contribute to more effective tax collection.'<sup>81</sup>

A European Taxpayer's Code could improve tax collection and ensure better tax compliance across the EU.<sup>82</sup> The Commission Services launched a public consultation in order to collect the opinions of all interested stakeholders on the development of a European Taxpayer's Code.<sup>83</sup> Most respondents replied that the greatest benefit of the European Taxpayer's Code would be to ensure the equal treatment of European taxpayers and to improve the access to the internal market in case of cross-border operations thanks to the application of uniform principles.<sup>84</sup> These principles have been voted as the five most important principles: lawfulness (tax levied only by virtue of law), legislative process and consultation (possibility for interested parties to be heard), legal certainty (non-retroactivity of legislation, right to a high degree of predictability, principle of good faith, correct, efficient and timely application of double taxation treaties with other countries...), drafting standards

<sup>77</sup> Approved by OECD Council on 27 April 1990. Based on country replies to a questionnaire sent out in 1988.

<sup>78</sup> Centre for Tax Policy and Administration, Tax guidance series, General Administrative Principles - GAP002 Taxpayers' Rights and Obligations, [http://www.oecd.org/tax/administration/Taxpayers' Rights and Obligations-Practice\\_Note.pdf](http://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf).

<sup>79</sup> European Commission (2012), Communication from the Commission to the European Parliament and the Council – An action plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final; IP/12/1325.

<sup>80</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, {SWD(2015) 60 final}, COM(2015) 135 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/com\\_2015\\_135\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/com_2015_135_en.pdf), 5.

<sup>81</sup> [http://ec.europa.eu/taxation\\_customs/common/consultations/tax/2013\\_tpcode\\_en.htm](http://ec.europa.eu/taxation_customs/common/consultations/tax/2013_tpcode_en.htm).

<sup>82</sup> Fighting evasion: Commission launches consultations on EU Taxpayer's Code and EU Tax Identification Number, press release 25 February 2013, [http://europa.eu/rapid/press-release\\_IP-13-154\\_en.htm](http://europa.eu/rapid/press-release_IP-13-154_en.htm).

<sup>83</sup> IP/13/154.

<sup>84</sup> Summary Report on the outcome of the public consultation from DG TAXUD, *A European Taxpayer's Code*, Brussels 12 September 2013, TAXUD.D.2 (Ares 2013) 3252439, 7.



for tax legislation (ensuring that tax legislation is clear and understandable), judicial review (possibility of a judiciary appeal with an independent court).<sup>85</sup>

It is not a coincidence that the principle of legality and the principle of equality were mentioned as national limits to take into account when delivering tax rulings. Obviously, it is necessary that when the European Commission or the European Parliament introduces measures on the exchange of information on tax rulings, taxpayers' rights will be honoured. Therefore, it would be useful to elaborate, beside the Proposal for a Council Directive amending Directive 2011/16/EU, a European Taxpayer's Code.

Meanwhile, the Confédération Fiscale Européenne (CFE), the Asia-Oceania Tax Consultants' Association (AOTCA) and the Society of Trust and Estate Practitioners (STEP), have produced a Model Taxpayer Charter<sup>86</sup> of taxpayer rights and responsibilities, based on a survey on the status quo of taxpayer rights and obligations in 37 countries. The Model Taxpayer Charter is meant as a consultation draft on which feedback from governments, international organisations and interested stakeholders is welcome, with the aim of producing a final Model Taxpayer Charter in the near future.

Ian Edward Hayes, Vice President of CFE and co-author of the report said: 'Nowadays taxpayers are required to be transparent in their fiscal affairs in pursuit of which the first steps can be found in clear and simple tax legislation. As we begin the search for tax systems fit for purpose in the 21st Century we need to accept that transparency, clarity and simplicity can only work in an environment where taxpayers are treated equally. The greatest assurance of this will come when each and every State has adopted a taxpayer charter.'<sup>87</sup>

The Model Taxpayer Charter pays proper attention to 'rulings and interpretations':

#### **'Article 12: Rulings and interpretations**

Rulings and interpretations of tax law provided by the Tax Administration are an important component of the tax system. Taxpayers seek clarity and certainty with respect to their transactions and arrangements. At the same time, a rulings and technical interpretations function can provide guidance to Tax Officers in carrying out their duties. Anti-avoidance legislation is often a reason for seeking a technical interpretation or ruling, because the application of these provisions is frequently judgmental on the part of the Tax Administration. The provisions of this Article address rulings and technical interpretations.

**1. The Tax Administration shall not maintain secret positions on the interpretation of legislation, or based on fiscal data, and where the Tax Administration adopts a position, it shall be published and made generally available to Taxpayers and Tax Advisors.**

If the Tax Administration adopts a position on interpretation of legislation, it shall be published and generally available to Taxpayers and Tax Advisors, and shall not be kept secret. The public interest is not served by maintaining secret positions on the interpretation of tax legislation. Similarly if the Tax Administration adopts policies on such matters as

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<sup>85</sup> Summary Report on the outcome of the public consultation from DG TAXUD, *A European Taxpayer's Code*, Brussels 12 September 2013, TAXUD.D.2 (Ares 2013) 3252439, 7.

<sup>86</sup> Model taxpayer charter to promote greater fairness in taxation across the world, press release, 13 May 2013, <http://www.cfe-eutax.org/sites/default/files/Taxpayer%20Charter%20Press%20release%20EN.pdf>.

<sup>87</sup> Model taxpayer charter to promote greater fairness in taxation across the world, press release, 13 May 2013, <http://www.cfe-eutax.org/sites/default/files/Taxpayer%20Charter%20Press%20release%20EN.pdf>.

transfer pricing and valuations it shall reveal such policies and their basis in a timely manner.

**2. A Taxpayer or a Tax Advisor may apply for a technical interpretation on a matter, and the Tax Administration shall normally respond within a reasonable period of time. However, if the matter is under litigation, is the subject of a tax appeal that is ongoing, or is a matter upon which the Tax Administration has not adopted a position, it is permissible for the Tax Administration to respond without giving an interpretation.**

It will be unfair and prejudicial for the Tax Administration to be required to provide an analysis on a matter that is currently the subject of litigation, or for a Taxpayer to request a technical interpretation on a matter that is currently under dispute with the Tax Administration.

**3. A rulings process shall be in place whereby a Taxpayer or a Tax Advisor may apply to the Tax Administration for a ruling on the operation of the taxation law as it affects a Taxpayer, and seek internal review of – or appeal – an unfavourable ruling.**

A rulings process shall be in place whereby a Taxpayer or a Tax Advisor may request a ruling with respect to a particular transaction or series of transactions. In contrast to a technical interpretation that is general in nature, a ruling is specific to the facts as presented. The Tax Administration shall be bound by the ruling that is given, unless the actual facts of the Taxpayer are different to those stated in the ruling request, in such a way that the rulings given are affected.

The rights of a Taxpayer to internal review of – and appeal against – an assessment should also apply to an unfavourable ruling given to a Taxpayer.

**4. Such a ruling shall be binding on the Tax Administration to the extent of the specific rulings given or arising from internal review or appeal, unless the facts are subsequently found to be materially different in respect of the reasonable application of the positions in the ruling.**

**5. Published interpretations of tax matters shall be binding on the State unless and until withdrawn.**

Published interpretations shall be binding on the State and the State may not argue a contrary position in dealing with the affairs of a Taxpayer, unless and until the published interpretation is withdrawn. This places a heavy onus on the Tax Administration to keep technical interpretations and published positions up to date, which is as it should be.<sup>88</sup>

This attention to rulings in the Model Taxpayer Charter underscores those changes in the exchange of information of tax rulings should be accompanied with guarantees of taxpayers' rights. As long as there is no European or international Code on Taxpayers' Rights, EU Member States can rely on these proposals to introduce a national Model themselves.

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<sup>88</sup> A Model Taxpayer Charter, <http://www.cfe-eutax.org/node/3134> and <http://www.cfeeutax.org/sites/default/files/Model%20Taxpayer%20Charter,%20preliminary%20report,%20text.pdf>, 52.

## 2. 'TAX RULINGS': ADVANCE TAX RULINGS, ADVANCE PRICING AGREEMENTS AND OTHER 'TAX ARRANGEMENTS'

### KEY FINDINGS

- In this paper, the term 'tax rulings' is used as collective term for all kinds of tax 'arrangements'. A tax ruling may occur in the form of an advance tax ruling, an advance pricing agreement or any other 'tax arrangement'. There are formal and informal 'tax rulings'.
- An advance tax ruling is a statement provided by the tax authorities, or an independent council, regarding the tax treatment of a taxpayer with respect to his future transactions and on which he is – to a certain extent – entitled to rely.
- An advance pricing agreement determines (in accordance with the law and the OECD Guidelines) in advance if the transfer price between two related parties within a group is at arm's length compared to the transfer price with an unrelated party.
- In practice, many other 'tax arrangements' are made – without any framework – between the taxpayer and the local tax inspector before a specific transaction takes place or before filing the tax return, after a tax mediation process, in court, within a horizontal monitoring process, or, within the context of a tax audit.
- It is clear that it is the European Commission's intention to cover the administrative practice of advance tax rulings, advance pricing agreements and all 'other advance tax arrangements', even within the context of a tax audit.

### 2.1. Terminology

#### 2.1.1. 'Tax rulings'

In this paper, the term 'tax ruling' is used as collective term for all kinds of tax 'arrangements' between the tax authorities and the taxpayer. More specifically, a tax ruling can occur in the form of an advance tax ruling, an advance pricing agreement or any other 'tax arrangement'.

In fact, it is more correct to speak of tax 'arrangement' – instead of tax ruling – as a collective term for advance tax rulings, advance pricing agreements and other 'tax arrangements'. An 'arrangement' can imply an 'agreement', but not necessarily in the legal-technical sense of the word. The term 'arrangement' can serve as a comprehensive and legally neutral collective term, unlike, for instance, an agreement, a contract, a

compromise, a unilateral administrative legal decision, an advance tax ruling, a settlement and a commitment promise. An 'arrangement' can also be interpreted as an 'agreement to meet each other somewhere'. In this sense, the term expresses the underlying horizontal and reciprocal relationship between the tax authorities and the taxpayer without seeking to provide it with legal qualification. Hence, advance tax rulings are a very small part of all kinds of tax 'arrangements'.

However, we use the term 'tax ruling' as collective term in this paper – but why?

Independent of the type of 'arrangement' agreed on between the tax authorities and the taxpayer, the literature always mentions these as 'tax rulings'. Independent of the existence of an actual tax ruling system, a Member State will qualify its 'arrangements' with the collective term 'tax rulings'. E.g., there are the studies of the International Fiscal Association on 'Advance rulings' of 1965<sup>89</sup> and 1999;<sup>90</sup> at its Congress of 2011 there was a seminar on the topic 'Tax Rulings in an International Framework'.<sup>91</sup> Furthermore, there is 'The International Guide to Advance Rulings', updated until 2003.<sup>92</sup>

Nevertheless, in all these surveys we find that most Member States use another term *in concreto*. Some Member States use the term advance tax rulings (NL), others 'décisions anticipées' (BE, LU), (revenue) opinions (IE, BG, CY, HR), 'rescrits fiscaux' (FR), advance revenue rulings (MT), Auskunft (DE), individual responses (EL), diritto di interpello (IT), consultas tributarias (ES), förhandsbekeden (SE), international tax rulings (IT, AT), confirmations (LV, also CH), non-statutory advance clearances (UK), official decisions or answers on technical questions (CR), etc.

The TAXE Committee is called a Special Committee on 'tax rulings and other measures similar in nature or effect' as well. The EC Proposal for a Council Directive amending Directive 2011/16/EU uses the term 'ruling' as an agreement, communication, or any other instrument or action with similar effects, including one issued in the context of a tax audit.<sup>93</sup>

Hence, in this paper, 'tax rulings' is meant as the collective term for 'advance tax rulings', 'advance pricing arrangements' and 'other arrangements'.

'Tax rulings' take a position on the divide between public and private law, a vertical and horizontal relationship, the public and individual interest. The tax administration explains how it will exercise its tax power in the particular situation of the taxpayer before or after the transaction took place or before or after the filing of the tax return.

There are formal and informal 'tax rulings'. Formal tax rulings are issued within a framework, informal are not. Legal or administrative provisions can describe the process, which is the competent authority, who can initiate a request, which information must be delivered, in which taxation stage they can be or should be obtained, the duration of the procedure and of the binding effect, if taxpayers have to pay a fee, if there is a disclosure practice, etc. That is the case for advance tax rulings systems, which are still rare in the

<sup>89</sup> X., *Advance rulings by the tax authorities at the request of a taxpayer*, in *Cahiers de droit fiscal international (IFA)*, Volume Lb, London, IFA, 1965, 277 p.

<sup>90</sup> X., *Advance rulings*, in *Cahiers de droits fiscal international (IFA)*, Volume LXXXIVb, Den Haag/London/Boston, Kluwer Law International, 1999, 674 p.

<sup>91</sup> IFA 65<sup>th</sup> Congress in Paris, 11-16 September 2011.

<sup>92</sup> Sandler, D. & Romano, C. (eds.), *The International Guide to Advance Rulings*, Amsterdam, IBFD, loose-leaf publication.

<sup>93</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, {SWD(2015) 60 final}, COM(2015) 135 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/com\\_2015\\_135\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/com_2015_135_en.pdf), 10.

EU. Similarly, advance pricing agreements can be applied for within a framework as suggested in the EU APA Guidelines. Meanwhile, advance pricing agreements or arrangements have become well established in the EU Member States.<sup>94</sup> Other 'arrangements', 'interpretations' or 'opinions' are also well established in the EU Member States, but are delivered without any legal or administrative framework. However, EU Member States call their informal systems 'tax rulings'.

### 2.1.2. Advance tax rulings<sup>95</sup>

Tax rulings are normally issued either before the transaction has been undertaken, or before a tax return has been submitted for the period covering the transaction (pre-return) – possibly already carried out. In these cases, they are then also referred to as advance tax rulings.<sup>96</sup>

An advance tax ruling is a statement provided by the tax authorities, or an independent council, regarding the tax treatment of a taxpayer with respect to his future transactions and on which he is – to a certain extent – entitled to rely. In other words, an advance tax ruling is an – in principle – binding legal decision, given by the competent authority in accordance with the law, on the application of tax law in a specific situation before any tax consequences occur.

The topics on which tax rulings can be delivered could be very broad (personal income tax, corporate income tax, value added tax, ...) and for all kind of taxpayers (multinationals, SME, natural persons) or very specific for multinationals only. Some excluded tax matters are tax rates and calculation of taxes, tax declaration, examination and control, evidence, tax assessment, terms, professional secrecy, administrative sanctions, tax increase, etc. Some of these tax matters cannot be in 'advance' of a transaction; others would violate the principles of legality and equality. Moreover, neither exemptions nor reductions are allowed. No taxation, nor exemption or reduction without representation.

Advance tax rulings can be cross-border or inbound.

The competent authority could be the local or central tax administration. Mostly, there is an autonomous service or committee within the central tax administration that issues rulings or gives binding advice to the local or central tax authorities. The competent authority could be an experts commission as well. This could be the case for all tax rulings or only for a few important tax rulings with a precedential value. However, it is clear that the competent authority should be a commission, and not only one member of the tax administration. This is important for the consistency and uniformity in tax policy towards similarly situated taxpayers.

Advance tax rulings can only be applied for individual transactions. Hypothetic questions are not eligible. Hence, it is not possible to apply for an advance tax ruling for another taxpayer. This individual context is also the reason why advance tax rulings have *de iure* no

<sup>94</sup> The JTPF collected statistics on advance pricing arrangements in force at the end of 2013, to which 26 out of 28 Member States provided data: Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_60.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_60.pdf), 7 and Annex 4: statistics on APAs: European Commission 2014, EU JTPF, *Statistics on APAs at the end of 2013*, JTPF/007/2014/EN, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/final\\_apas\\_statistics\\_2013\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_apas_statistics_2013_en.pdf).

<sup>95</sup> The following description of what advance tax rulings are or ought to be is based on the public information on advance tax rulings in the EU Member States.

<sup>96</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_60.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_60.pdf), 6.

precedential value. However, advance tax rulings have a *de facto* precedential effect, when they are published and accessible.

Advance tax rulings have an – in principle – binding effect on the tax authorities (including the tax auditor or tax inspector). Advance tax rulings are not binding forever. Firstly, the duration of the binding effect mostly lasts maximum 5 years. Secondly, advance tax rulings *contra legem* are not binding the tax authorities. Advance tax rulings can be obtained as long as the competent authority gives a very strict interpretation of essential elements of the applicable tax law. Discussion may arise on the margin of appreciation of the competent authority when tax law is unclear. The vaguer the tax law is, the more margin of appreciation for the competent authority. Thirdly, changes in tax law make tax rulings not binding any longer.

The taxpayer is not required to carry out the transaction. Therefore, is not clear how advance tax rulings are legally qualified (agreement, unilateral administrative decision, ...).

The ruling application of the taxpayer starts a procedure. There could be an informal prefilling meeting, a formal filing meeting after the written application or there could be only a written procedure. The taxpayer who applies for a ruling has to hand over all the necessary information spontaneously or at the request of the tax administration. Depending on the complexity of the ruling application, the duration of the procedure to obtain a ruling can be longer (3-6 months) or shorter (a few weeks).

Because of the importance and the consistency of advance tax rulings, there could be an internal exchange of information (in databases) on advance tax rulings within the tax authorities of a Member State. The compliance with the conditions in the advance tax rulings should be controlled as well. However, the public publication of all individual advance tax rulings (summarized and anonymously) on a website is rare. In some Member States, some important advance tax rulings (with *de facto* precedential value) are published individually or referred to in the annual report of the ministry. Policy guidelines of the competent authority can be published as well.

The possibility to obtain an advance tax ruling can depend on the payment of a fee or not.

### 2.1.3. Advance pricing agreements

Advance pricing agreements may be uni-, bi- or multilateral agreements. Bi- and multilateral advance pricing agreements are agreements between tax authorities. Unilateral advance pricing agreements will only require understandings between a tax administration and the taxpayer concerned.<sup>97</sup>

Given the current aiming for between Member States, the following sentences in the EU APA Guidelines of 2007 are very interesting:

'Although there may be circumstances where the taxpayer has good reasons to believe that a unilateral APA is more appropriate than a bilateral, bilateral APAs are preferred over unilateral APAs. Where a unilateral APA may reduce the risk of double taxation to some degree, care must be taken that unilateral APAs are consistent with the arm's length principle in the same way as bilateral or multilateral APAs.

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<sup>97</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

In the first instance the taxpayer has the right to decide whether a unilateral or bilateral APA is required.

The option of including another MS in the APA could be considered by the MS preparing for a unilateral APA. Taxpayers however should not be forced into a bilateral APA.

Tax administrations are entitled to turn down requests for unilateral APAs where the tax administration feels that a bilateral or multi-lateral APA is more appropriate, or feels that no APA at all is appropriate.

The rights of other tax administrations and taxpayers should not be affected by the existence of a unilateral APA. When a unilateral APA is concluded, a MAP should not be excluded afterwards

With the 'Code of Conduct' (Business Taxation), Member States have committed themselves to spontaneously exchange details of concluded unilateral APAs. The Exchange of Information (EOI) should be made to any other tax administration directly concerned by the unilateral APA and should be done as swiftly as possible after the conclusion of the APA'.<sup>98</sup>

All advance pricing agreements are arrangements that determine, in advance of controlled transactions, how transfer pricing rules will apply on that transaction. Therefore, an appropriate set of criteria for the determination of the transaction price will – according to the arm's length principle – be taken into account (for example method, comparable and appropriate adjustments thereto, critical assumptions as to future events).<sup>99</sup>

In other words, an advance pricing agreement will determine (in accordance with the law and the OECD Guidelines) if the transaction price between two related parties within a group is at arm's length compared to the transaction price with an unrelated party. Therefore, the advance pricing agreement should not agree precisely on the actual profit which should be taxed in the future. An advance pricing agreement will in advance provide certainty concerning the transfer pricing methodology and therefore simplify or prevent costly and time-consuming tax examinations into the transactions included in the advance pricing agreement.

The EC proposal for a Council Directive amending Directive 2011/16/EU defines an 'advance pricing arrangement' as:

'any agreement, communication or any other instrument or action with similar effects, including one issued in the context of a tax audit, given by, or on behalf of, the government or the tax authority of one or more Member States, including any territorial or administrative subdivision thereof, to any person that determines in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment.

Enterprises are associated enterprises where one enterprise participates directly or indirectly in the management, control or capital of another

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<sup>98</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

<sup>99</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

enterprise or the same persons participate directly or indirectly in the management, control or capital of the enterprises.

Transfer prices are the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises, and 'transfer pricing' is to be construed accordingly'.<sup>100</sup>

Article 25 (3) of the OECD Model Tax Convention permits countries to enter into Advance Pricing Agreements.<sup>101</sup>

The EU APA Guidelines prescribe the conduct of an advance pricing agreement process. According to these Guidelines, an advance pricing agreement application should typically have four distinct stages: a pre-filing stage/informal application, a formal application, an evaluation and negotiation of the advance pricing agreement and finally a formal agreement.<sup>102</sup>

The duration of an advance pricing agreement procedure takes longer than that of an advance tax ruling. The EU APA Guidelines suggest the following timetable:

'Pre-filing stage – informal application – month 0

An informal approach is made by a taxpayer to two tax administrations, requesting an APA. The tax administrations listen to the statements made and indicate whether the particular case merits an APA. The tax administrations consult with one another to ensure both will agree. Each has brief discussions with the taxpayer over what information should be provided in the first instance and explores what methodology will be appropriate.

Months 1-3

The formal application is received by each tax administration. The CAs establishes in month 1 a timetable to evaluate and negotiate the APA. Both tax administrations conduct an initial review independently and issue information requests if necessary.

Months 4-12

Tax administrations continue to evaluate independently with the full cooperation of the taxpayers. A first full face to face meeting could take place with a presentation to all involved parties by the taxpayer. The CAs consult as appropriate. The taxpayer is involved in this evaluation and is consulted. By the end of this period each tax administration has formulated its position. The CAs are able to exchange position papers. They agree to meet to discuss these in Month 14.

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<sup>100</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, {SWD(2015) 60 final}, COM(2015) 135 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/com\\_2015\\_135\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/com_2015_135_en.pdf), 10-11.

<sup>101</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

<sup>102</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.



#### Month 13

Each CA evaluates the other CA's position paper and obtains further information where necessary. (Alternatively, in month 12 one CA issues a position paper and in month 13 the other CA issues a position paper rebutting the position and suggesting alternatives.)

#### Months 14-16

Discussions occur between CAs. Further clarifications are obtained from the taxpayer who is kept informed of the CA negotiations.

#### Month 17

The CAs reach agreement. The taxpayers are consulted and indicate their agreement.

#### Month 18

The APA is formally agreed between the CAs. Formal documents are exchanged. The taxpayers receive assurances that the APA is acceptable.

More complex cases may take longer, but, with the cooperation and planning of all parties, the time taken to conclude an APA should be kept to a minimum.<sup>103</sup>

The documentation obligation is very extensive for the taxpayer when applying for an advance pricing agreement. According to the EU APA Guidelines, the EU Transfer Pricing Documentation (EUTPD) will serve as a useful basis for any APA application.<sup>104</sup>

With respect to fees, the EU APA Guidelines prescribe it is for Member States to decide if a fee system is appropriate. A fee should not be a precondition for an efficient service which should be provided as a matter of course. If they are used, fees should be charged by reference to a lump sum amount as a pure entry fee and/or linked to the extra costs incurred by the tax administration as a result of the APA. Fees are particularly appropriate where without a fee a tax administration would be unable to have an APA programme. But they should not be set so high so as to be a disincentive to apply for an APA.<sup>105</sup>

#### 2.1.4. Other 'advance tax arrangements'

In practice, many tax 'arrangements' are made – without any framework – between the taxpayer and the local tax inspector before a specific transaction takes place or before filing the tax return, after a tax mediation process, in court, within a horizontal monitoring process, or, within the context of a tax audit. These are the so-called informal tax rulings.

The staff working document on the proposal for a Council Directive amending Directive 2011/16/EU mentions that 'some rulings do offer legal certainty for tax-driven structures which rely on tax planning tools typically used by multinational enterprises in order to reduce their tax burden. Tax rulings which result in a low level of taxation in one Member State entice companies to artificially shift profits to that jurisdiction. Not only does this lead

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<sup>103</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

<sup>104</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

<sup>105</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

to serious tax base erosion for the other Member States, but it can further incentivise aggressive tax planning and corporate tax avoidance'.<sup>106</sup> Mostly, these kind of tax rulings are not advance tax rulings in the sense as described above, but are rather informal tax rulings or tax arrangements.

Tax 'arrangements' cover topics like extra-statutory agreements, advance agreements offering a favourable tax treatment based on statutory or case law, agreements on taxable income in cases of uncertainty, formal and informal agreements and interpretations.

#### 2.1.5. Parallelism

In some Member States, taxpayers can obtain a formal advance tax ruling, while they can ask for an informal 'arrangement' (agreement, decision or statement) of the central or local tax authorities on the same topic at the same time (e.g. BE). In other countries, such a parallelism, which is a possible cause of a lack of consistency and uniformity in the interpretation or application of tax law, does not exist (e.g. NL).

## 2.2. The EC proposal: 'Advance cross-border rulings' and 'advance pricing arrangements'

The EC Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of information in the field of taxation deals with 'advance cross-border rulings' and 'advance pricing arrangements'.<sup>107</sup> The meaning of the latter is clear, that of the former deserves clarification.

An 'advance cross-border ruling' is any agreement, communication, or any other instrument or action with similar effects, including one issued in the context of a tax audit, which:

(a) is given by, or on behalf of, the government or the tax authority of a Member State, or any territorial or administrative subdivisions thereof, to any person;

(b) concerns the interpretation or application of a legal or administrative provision concerning the administration or enforcement of national laws relating to taxes of the Member State, or its territorial or administrative subdivisions;

(c) relates to a cross-border transaction or to the question of whether or not activities carried on by a legal person in the other Member State create a permanent establishment;

(d) is made in advance of the transactions or of the activities in the other Member State potentially creating a permanent establishment or of the filing of a tax return covering the period in which the transaction or series of transactions or activities took place.<sup>108</sup>

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<sup>106</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_6\\_0.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_6_0.pdf), 6.

<sup>107</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, {SWD(2015) 60 final}, COM(2015) 135 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/com\\_2015\\_135\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/com_2015_135_en.pdf), 10.

<sup>108</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, {SWD(2015) 60 final}, COM(2015) 135 final,

The Commission's staff working document shows the possible options for the definition of a tax ruling considered during the preparation of the initiative.<sup>109</sup> The definition of a tax ruling is kept very broad:

- It does not matter who the competent authority is (even though one might ask whether an independent experts commission is intended as well), nor who the taxpayer is ('to any person', 'a cross-border transaction or to the question of whether or not activities carried on by a legal person in the other Member State create a permanent establishment');
- It does not matter whether it concerns the interpretation or application of a legal or administrative provision;
- The cross-border transaction may involve, but is not restricted to, the making of investments, the provision of goods, services, finance or the use of tangible or intangible assets and does not have to directly involve the person receiving the advance cross-border ruling;<sup>110</sup>
- It does not matter whether the application is pre-transaction or pre-return. The advance tax rulings therefore include tax rulings given in the context of a tax audit when they also apply to future years for which tax returns have not yet been received.<sup>111</sup> This is a very important aspect, which allows the definition to cover many 'tax rulings' or in fact, 'other arrangements'. Only when the 'arrangements' are post-return, 'cross-border tax rulings' are excluded.

However, the proposal excludes VAT, customs duties, excise duties and social security contributions, as they are already covered by other legislation on administrative cooperation.<sup>112</sup>

This definition is a very deliberate choice, which appears from the Commission's staff working document. This document indicates that

'some Member States could regard Article 9 of Directive 2011/16/EU on administrative cooperation as not applicable to their administrative practices, i.e. that the definition of tax ruling as outlined in the DAC or in the Model Instruction does not apply to their practice or parts of it. More specifically, some Member States point out that their administrative practices are limited to a strict interpretation of legal provisions without any discretionary powers for the tax administrations or tax inspectors and without approving any level of taxation. They do not, therefore, consider these practices as meeting the definition of a tax ruling as set out in the Model Instruction, which is 'any practice, agreement with tax offices or exercise of discretion by a tax authority, which provides some degree of

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[http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/com\\_2015\\_135\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/com_2015_135_en.pdf), 10.

<sup>109</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_6\\_0.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_6_0.pdf), 38.

<sup>110</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, {SWD(2015) 60 final}, COM(2015) 135 final, 10.

<sup>111</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_6\\_0.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_6_0.pdf), 40.

<sup>112</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_6\\_0.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_6_0.pdf), 39.

agreement as to the level of taxation on a particular company, activity or business, whether or not this is called a ruling'. Consequently, where Member States consider their administrative practice as not falling under the definition of a tax ruling, they may believe that they are not obliged to inform other Member States about such practices'.<sup>113</sup>

Hence, it is clear that it is the European Commission's intention to cover the administrative practice of advance tax rulings, advance pricing agreements and all 'other advance tax arrangements'. Therefore, in this paper, we will continue studying the tax rulings systems of the EU Member States in the broad sense of this definition.

The crucial question arises if Member States will qualify their country-specific 'statements', 'opinions', 'decisions', etc. as a 'tax ruling' in the sense of this EC proposal on automatic exchange of information.

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<sup>113</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_6\\_0.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_6_0.pdf), 15.

### 3. NON-HARMONIZED 'TAX RULINGS' SYSTEMS IN THE EU

#### KEY FINDINGS

- There are as many 'tax rulings' systems as there are countries in the world.
- Should the EU think about more coordination or harmonisation of tax rulings procedures?
- There are long traditions as well as recent developments on tax rulings in EU Member States.
- Some Member States have a legal or (more or less modest) administrative/policy framework for the tax rulings practice, others do not. Tax rulings practices on the basis of a legal or administrative framework that is known by the taxpayers, should be encouraged.
- Tax rulings could deal with all kinds of tax topics, although the request could be restricted to some specific tax matters as well.
- In general, 'tax rulings' (in the broad sense) have a binding effect on the tax authorities (on the basis of a legal/administrative provision for advance tax rulings and advance pricing agreements, or on the basis of the principle of legitimate expectations for 'other tax arrangements'), but this is mostly under condition. The applicant-taxpayer is not bound by an obtained advance tax ruling, which means that he can choose not to do the transaction.
- Tax rulings could be delivered by the tax authorities in the broad sense.
- Mostly, Member States ask for a fee for an advance tax ruling or advance pricing agreement but not for an informal arrangement.
- Opinions on the disclosure of tax rulings differ.
- In some Member States appeal against 'tax rulings' is foreseen, in others it is not, or it is unclear whether it is possible. However, Models of Taxpayers' Rights prescribe the possibility of judicial review.

### 3.1. Towards an EU harmonized tax rulings system?

There is not such a thing as 'the' system of 'tax rulings' (in the sense of formal and informal tax arrangements). There are as many 'tax rulings' systems as there are countries in the world. Of course, there are some trends, but in the end, all 'tax rulings' systems differ. Hence, in the European Union 28 different 'tax rulings' practices exist.

The consequence is that one has to overlook the entire 'tax ruling' system of a Member State to conclude whether and to what extent a tax ruling practice is efficient, effective, in accordance with legal provisions, transparent, popular, etc.

Romano wrote a PhD that contains a proposal for a common EU tax ruling system along the lines of the unified tax ruling procedure in the field of customs, i.e. the binding tariff information.<sup>114</sup> In his presentation in the Workshop on Tax Rulings in the European Parliament on 2 June 2015,<sup>115</sup> Romano stressed that little attention has been given to the coordination, harmonization or unification of the tax procedural issues of tax rulings today. The EU should think about a common tax ruling procedure that binds tax authorities on the same outcome in respect of each cross-border case within the Community. More specifically, besides ordinary rulings issued by the competent national tax authorities and exchange of information on those rulings, the EU should think about a European Ruling Committee that might be entrusted with powers of guidance and coordination.<sup>116</sup> This body should also be empowered to issue second instance rulings where necessary. Romano expressed his concern: 'We should also hope that the European mandatory automatic exchange of rulings is just a step further towards a common European tax rulings system increasing the level of certainty, consistency, uniformity and transparency so to reduce harmful tax competition, including illegal state aids, and to enhance the competitiveness of the European market'.<sup>117</sup>

Meanwhile, there is the positive experience of the pilot project of cross-border VAT Rulings.<sup>118</sup> This project has started in June 2013 and is now scheduled to continue until 30 September 2018. It was set up by the EU VAT Forum. A list of cross-border VAT rulings is available.<sup>119</sup>

Nowadays, 28 national tax rulings practices should be analysed. They all differ.

<sup>114</sup> Romano, C., *Advance tax rulings and principles of law: towards a European tax rulings system?*, Amsterdam, IBFD, 2002, 544 p.

<sup>115</sup> Directorate General for Internal policies, Policy Department A: Economic and Scientific Policies, Workshop on Tax Rulings, 2 June 2015, <http://www.europarl.europa.eu/news/en/news-room/content/20150529IPR61028/html/Policy-Department-Economic-and-Scientific-Policy-TAXE-Committee>.

<sup>116</sup> See also: Lejeune, I., Vandenberghe, S. & Van De Putte, M., 'VAT Rulings on Cross-Border Situations in the European Union', *International VAT Monitor*, July / August 2014, pp. 181-187.

<sup>117</sup> Directorate General for Internal policies, Policy Department A: Economic and Scientific Policies, Workshop on Tax Rulings, 2 June 2015, <http://www.europarl.europa.eu/news/en/news-room/content/20150529IPR61028/html/Policy-Department-Economic-and-Scientific-Policy-TAXE-Committee>.

<sup>118</sup> European Commission, Directorate-General Taxation and Customs Union, Indirect Taxation and Tax administration, Tax administration and fight against tax fraud, Information notice: *Test Case for private ruling requests relating to cross-border situations*, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/vat/vat-forum-note-information\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/vat-forum-note-information_en.pdf) and [http://ec.europa.eu/taxation\\_customs/taxation/vat/traders/cross\\_border\\_rulings/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/vat/traders/cross_border_rulings/index_en.htm).

<sup>119</sup> European Commission, Directorate-General Taxation and Customs Union, Indirect Taxation and Tax administration, Tax administration and fight against tax fraud, *EU VAT Forum, Cross-border Rulings* (update 16 March 2015), taxud.c.4/LV/tm/(2015)1296870, [https://circabc.europa.eu/sd/a/1148d16b-efb6-4b2c-b6e1-9bcd33eabf24/Cross%20Border%20Rulings%20\(March%202015\).pdf](https://circabc.europa.eu/sd/a/1148d16b-efb6-4b2c-b6e1-9bcd33eabf24/Cross%20Border%20Rulings%20(March%202015).pdf) and [http://ec.europa.eu/taxation\\_customs/taxation/vat/traders/cross\\_border\\_rulings/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/vat/traders/cross_border_rulings/index_en.htm).

This overview of features of the tax rulings practices in the EU (in the paper and in the annex to this paper) is based on the information that is publicly available and that is written in English, French, German or Dutch. Special thanks goes to the International Bureau of Fiscal Documentation in Amsterdam for their hospitality. See list of references for the sources used for the next overview. Annex 3 of the commission staff working document to the Directive proposal of 18 March 2015, the International Guide on Advance Tax Rulings (IBFD, 2003) and the analysis by Lex Mundi (2012) were very useful as well.

### 3.2. Long traditions and recent developments in the EU Member States

There are Member States with a long tradition in formal or informal tax rulings (BE, BG, DE, DK, ES, FI, FR, HU, IE, IT, LU, NL, PT, SE, UK).<sup>120</sup> In Finland, for example, the tax legislation has permitted taxpayers to request advance binding rulings since 1 January 1940.

However, the most extant surveys are not up to date any longer. Several recent developments since 2012 can be mentioned.

Especially in the field of the advance pricing agreements, many EU countries have seen very recent changes. In Greece, an APA regime was introduced in 2014;<sup>121</sup> in the Slovak Republic on the 1<sup>st</sup> of September 2014;<sup>122</sup> in Lithuania in October 2012 (ATR as well).<sup>123</sup> On 1 August 2014, the amendments to the Financial Administration Law entered into force in Slovenia. According to the law, the Tax Procedure Act effective from 2007 introduced a system of tax rulings and from 1 August 2014 advance pricing agreements may be concluded for transfer pricing purposes.<sup>124</sup>

In the Netherlands, the main guidance on the APA/ATR policy was revised in 2014: the most substantial revision concerned additional scrutiny in respect of determining 'substance' in the Netherlands.<sup>125</sup>

In Belgium, the Flemish government submitted a proposal of Flemish Decree on the introduction of a Flemish tax ruling system in Flemish parliament in May 2015.<sup>126</sup>

The most prominent evolution is the example of Luxembourg, where the tax rulings practice has been given a legal framework since 1 January 2015, whereas Annex 3 of the European Commission's staff working document on the Proposal for amending Directive 2011/16/EU of 18 March 2015 still mentions that Luxembourg has no formal ruling procedure.<sup>127</sup>

<sup>120</sup> Sandler, D. & Romano, C. (eds.), *The International Guide to Advance Rulings*, IBFD, Amsterdam, loose-leaf publication; X., *Advance rulings*, in *Cahiers de droits fiscal international (IFA)*, Volume LXXXIVb, Den Haag/London/Boston, Kluwer Law International, 1999; X., *Advance rulings by the tax authorities at the request of a taxpayer*, in *Cahiers de droit fiscal international (IFA)*, Volume Lb, London, IFA, 1965; .

<sup>121</sup> Despiris, A., 'Greece: law amended and new APA programme introduced', *Transfer Pricing International Journal*, 4.11.2013.

<sup>122</sup> Kocis, M., 'An analysis of transfer pricing in Slovakia', *Tax Analysts*, 26.5.2014, 759.

<sup>123</sup> Daugėla, R., 'Binding rulings introduced in Lithuania', *European Taxation*, June 2012, 322.

<sup>124</sup> <http://regfollower.com/2014/09/27/slovenia-apa-concluded-for-transfer-pricing-purposes>.

<sup>125</sup> Vis, N., 'Introduction of substance requirements for Netherlands holding companies', *European Taxation*, December 2014, 583

<sup>126</sup> *Parl. St.* VI. Parl. 2014-15, stuk 369/1; Willems, R., 'Vlaanderen gaat toch ook formele rullingpraktijk opzetten', *Fiscale actualiteit* nr. 21, 04.06.2015, 7.

<sup>127</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_6\\_0.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_6_0.pdf), Annex 3: Legal aspects of practice of tax rulings for companies across Member States, 31; Mischo, P. &

### 3.3. Legal or administrative/policy framework

Some Member States have a legal or (more or less modest) administrative/policy framework for the tax rulings practice (AT, BE, BG, DK, EE, ES, FI, FR, DE, HU, IE, IT, LT, LU, MT, NL, PL, PT, RO, SE, SI, UK), others do not (HR, CY, EL, IE, LV, also CH). Almost all Member States combine so-called formal tax rulings with informal arrangements without any legal framework. Tax rulings practices on the basis of a legal or administrative framework that is known by the taxpayers, should be encouraged (Chapter 1 of this paper).

#### - Legal framework

Belgium has a legal framework for the procedure of advance tax rulings and (unilateral) advance pricing agreements.<sup>128</sup> The same goes for Luxembourg since 1 January 2015. Both advance tax rulings systems look similar but are not entirely the same.

To give an idea of the content of such a legal framework, a summary of the advance tax rulings system introduced in Luxembourg follows:<sup>129</sup>

**Legal framework** Incorporated in article 29a AO (General Tax Law) on 19 December 2014, entered into force on 1 January 2015 + Grand-Ducal regulation of 23 December 2014.

**Aim** To ensure a harmonized and uniform application of the tax laws across the various taxation offices, to increase the transparency of the tax ruling practice, to clarify the applicable filing and issuing procedures.

**'Commission des décisions anticipées'** = Advance Tax Ruling Commission

- Will assist tax offices with the execution and the harmonized application of Luxembourg domestic and international tax law.
- Will deal with requests related to business taxation.
- Members are appointed by the director of the Luxembourg Tax Administration (incl. president).
- Will the composition of the commission and its procedural and functional rules be published on the website or described in an administrative circular?

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Kerger, F., 'After 'Lux Leaks': welcome changes to Luxembourg's tax ruling practice', *Tax Analysts*, 30.3.2015, 1197.

<sup>128</sup> Willems, R., *Guide to Tax Rulings in Belgium*, Amsterdam, IBFD, 2012, 378 p.

<sup>129</sup> Mischo, P. & Kerger, F., 'After 'Lux Leaks': Welcome Changes to Luxembourg's Tax Ruling Practice', *Tax Notes International*, 30.03.2015, 1197-1201.



**Décisions anticipées**     ATR + APA (extended to other areas than intra-group financing transactions)

- Requests relating to the application of the Luxembourg and international tax law to one or several precise transactions (no requests for information on general tax aspects).
- Direct taxes only (income tax (incl. business taxation = transfer pricing), wealth tax, municipal business tax) – excluding VAT, registration duties, etc.
- No tax exemption nor tax reduction.

**Binding effect**     Tax rulings is binding the Luxembourg Tax Authorities for 5 years (29a AO), unless

- the situation or the transactions are incompletely or inaccurately described in the tax ruling request;
- the situation or the transactions realized at a later stage differ from those on the basis of which the tax ruling request was filed; or
- the tax ruling becomes noncompliant with domestic, European Union, or international law provisions

### Procedure

- **Applicants**     Each taxpayer
- **Requests**     Requests introduced before and pending on January 1, 2015 are automatically submitted to the tax ruling commission.
  - Procedure is initiated by the filing of a written tax ruling request with the principal of the relevant tax office or in the case where the competent tax office cannot be determined, the director of the Luxembourg tax administration.
  - Filing in person, sent by mail or by e-mail (private individual, businesses or advisors).
  - To be accepted by the LTA, a tax ruling request must therefore be filed at the latest on December 30 of the calendar year during which the transactions produce their legal effects.
  - The principal of the relevant tax office is required to transfer tax rulings on business taxation to the tax ruling commission.
  - The regulation does not vest the applicants of tax ruling requests with the right to be heard by the tax ruling commission in the event it issues a negative opinion

- **Mandatory information** a precise description of the applicant (name, address, file number) and the related and unrelated parties engaged in the transaction(s) as well as the description of their respective activity;
  - a detailed description of the transactions, which are envisaged in a serious and concrete manner and which have not produced their effects yet;
  - a detailed analysis of the legal issues together with a circumstanced motivation of the legal status of the applicant;
  - the assurance that all elements provided to the relevant tax office and required for its analysis are true and complete.
- **Decision to issue** The principal of the relevant tax office makes the decision to issue the tax ruling.
  - Unclear if an opinion issued by the tax ruling commission is binding the principal when making his decision, but the tax officer will presumably be obliged to consult with the Commission on any request for an advance decision relating to the business taxation.
  - Principals are obliged to take a decision.
  - Decision within 3 months (not obligatory).

**Administrative fee** If the request relates to business taxation, payable by the requesting individual or entity. The duty will range between 3.000 EUR and 10.000 EUR depending on the complexity of the request and the volume of work required.

**Recourse** No judicial action against a preliminary decision.

**Publication** Anonymous summary of the advance decisions in the annual report of the Luxembourg Tax Authorities (art. 7 of the regulation).

#### - Administrative/policy framework

The Netherlands for example have no legal framework for advance tax rulings and advance pricing agreements, but an administrative framework.

Main guidance on APA/ATR policy was published in policy decrees in 2004, with some minor revisions in 2014. The most substantial revision in 2014 concerned additional scrutiny in respect of determining substance.<sup>130</sup>

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<sup>130</sup> Organisatie en competentieregeling APA-/ATR praktijk, DGB 2014 / 296M; Behandelprocedure APAs, DGB 2014/3098; Behandelprocedure ATRs, DGB 2014/3099; Besluit dienstverleningslichamen, DGB 2014/3101; Vraag en antwoordbesluit dienstverleningslichamen, DGB 2014/3102; Besluit Winstallocatie Vaste Inrichtingen, IFZ 2010/157M; Besluit Verrekenprijzen, IFZ 2013/184M.

There is a special team at Rotterdam that handles advanced tax rulings and unilateral/bilateral advance pricing agreements as of 2004. This team may be consulted by local tax authorities and it may give them binding opinions in certain situations. Obligatory consultation must take place, inter alia, in requests for:

- confirmation of the participation exemption for situations where none of the subsidiaries of a holding carries out business activities in the Netherlands;
- confirmation of international structures that involve hybrid financing or hybrid legal entities;
- confirmation of the absence or presence of a permanent establishment in the Netherlands in respect of tax liability.

Certain situations, such as group financing companies and entities with limited to no real economic presence in the Netherlands engaged in IP-management, will be dealt with by the Rotterdam office exclusively as to ensure enhanced scrutiny for these situations, as will entities with mere holding, financing and licensing functions within international groups.

In Austria, for example, there is a legal basis from 2011 in the Bundesabgabenordnung, but it has been expanded with the publication of a Guidance on Tax Rulings on International Tax Law on 16 December 2014. This is an informative note of the Federal Ministry of Finance that defines the prerequisites under which a tax ruling according to the Austrian Tax Code may be issued.<sup>131</sup> The crucial requirements are sufficient economic substance in Austria and that the structure to be ruled is not considered 'undesirable' by Austrian tax authorities.

In Germany, there is a 'BMF-Schreiben' of December 2007 – beside the legal basis of September 2006 – on the prerequisites of advance tax rulings as well.

#### - Semi-formalized framework

Ireland, for example, has a semi-formalized 'revenue opinion' system by a decree with guidelines since 2002. However, a more formalized tax ruling system cannot be introduced without a constitutional amendment. Until 2002, formal guidelines in relation to the format and content of ruling requests were practically non-existent. Only one document, Statement of Practice SP-CT/3/90, dealing with requests for entitlement to the 10% rate of tax for manufacturing activities, was issued by the Revenue.<sup>132</sup> In July 2002, a comprehensive set of guidelines for taxpayers seeking a 'revenue opinion' was released. These guidelines specify the type of information that should be provided when seeking 'opinions', and identifies the appropriate offices to which they should be addressed. This semi-formalization of the prevailing practice falls short of the introduction of a tax rulings system.

The emphasis on 'opinions' rather than 'rulings' reflects the Revenue's awareness of the constitutional and legislative constraints under which they operate. They interpret and apply tax legislation, but they do not amend or create it. The courts have been scrupulous in avoiding making tax law as well. Revenue 'opinions' are issued upon request where the circumstances are complex or a transaction is unusual and the existing information services do not provide the clarity required.

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<sup>131</sup> Gottholmseder, G., 'Erweiterung des Rulings gemäß § 118 BAO auf internationale Sachverhalte / Austrian ministry of finance publishes guidance on tax rulings related to international tax law', *Steuer & Wirtschaft International*, 2015, 115-117

Practitioners do get informal opinions from the Revenues Commissioners – particularly in relation to inward investment and the International Finance Services Centre. Such opinions are not binding on the Revenue commissioners, but are not normally queried by them after the event. However, it is open to Revenue officials to review the position when a transaction is completed and all of the facts are known.<sup>133</sup>

The UK tax legislation provides that statutory advance clearance or approval may be given by HM Revenue & Customs to certain transactions. For businesses, HMRC will provide a non-statutory clearance if there is material uncertainty as to how tax law will apply to a specific transaction and if the issue is commercially significant. Such non-statutory clearances provide taxpayers with HMRC's view of what is the correct tax treatment.<sup>134</sup>

#### - No framework

Many EU Member States do not have any – legal or administrative/policy – framework for the 'tax rulings' practice (HR, CY, EL, IE, LV). In our view, the so-called tax rulings are 'other tax arrangements' (Chapter 2 of this paper).

An example outside the EU is Switzerland. With one exception in the Swiss VAT Law, Swiss tax law does not refer to rulings. Consequently, there are no guidelines that are set out formally in law describing the process to be followed to obtain a binding ruling. Some cantons have issued their own rules, or rather recommendations, which a taxpayer should follow to obtain a ruling within a reasonable time frame. Tax rulings are not based on statutory provisions, but on administrative practice.<sup>135</sup>

### 3.4. Tax topics

It is clear that advance pricing agreements deal with transfer pricing issues.

Advance tax rulings can deal with all kind of tax topics at the competent level of authority (BE), but it is possible that the request should be restricted to some specific (international) tax issues as well (AT, NL, LUX, FR (general 'rescrits' as well, DE, IT, MT).

In some Member States, informal 'other tax arrangements' can be obtained with respect to most tax issues at the competent level of authority (AT, BE, BG, HR, CY, CZ, DE, DK, EE (but no TP), EL, FI, FR, IE, LV, NL, PL, PT, RO, ES, SE, also CH), in other Member States informal 'other tax arrangements' are only possible for some specific (international) tax matters (AT, CZ, DK, FR, HU, IE, MT, NL, SE, SI, UK).

As mentioned in Chapter 2, 'other tax arrangements' could offer legal certainty for tax-driven structures which rely on tax planning tools typically used by multinational enterprises in order to reduce their tax burden. An example outside the EU is Switzerland.

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see also [https://www.bmf.gv.at/services/publikationen/Bericht\\_Steuerreformkommission.pdf](https://www.bmf.gv.at/services/publikationen/Bericht_Steuerreformkommission.pdf).

<sup>132</sup> Brothers, J.P., 'From the Double Irish to the Bermuda Triangle', *Tax Analysts*, 24.11.2014, 687.

<sup>133</sup> 'Ireland', *International Survey on Advance Tax Rulings*, Amsterdam, IBFD, 2003, loose-leaf publication.

<sup>134</sup> Alarie, B., Datt, K., Sawyer, A. & Weeks, G., 'Advance tax rulings in perspective: a theoretical and comparative analysis', *New Zealand Journal of Taxation Law and Policy*, December 2014, Vol. 20, 362.

<sup>135</sup> Niederer, C. & Dubach, M., 'Private Tax Rulings in Switzerland', *Bulletin for International Taxation*, Vol. 89, 2015, No 4/5, 16.3.2015.

Concrete situations where a tax ruling can be requested:<sup>136</sup>

- mixed company status;
- principal company status;
- tax exemption of a non-profit organization;
- profit calculation (transfer pricing);
- application of the withholding tax reporting procedure.

### 3.5. Binding effect

In general, 'tax rulings' (in the broad sense) have a binding effect on the tax authorities (on the basis of a legal/administrative provision for advance tax rulings and advance pricing agreements, or on the basis of the principle of legitimate expectations for 'other tax arrangements'), but this is in principle under the following conditions:

- the situation or the transactions are completely or accurately described in the request;
- the situation or the transactions realized at a later stage do not differ from those on the basis of which the request was filed;
- the tax ruling is and stays in accordance with domestic, European Union, or international law provisions (no *contra legem* tax rulings);
- the applicable legal provision on which the tax ruling relies did not change;
- there are no fraudulent means.

In particular, advance tax rulings are – in principle – binding statements for the tax authorities. Tax authorities are bound by advance tax rulings during a limited period of – in general – maximum 5 years.

In Hungary, for example, certain taxpayers may request a tax ruling on corporate income tax that is valid for 3 years regardless of the changes in legislation.

It is clear that for informal 'other tax arrangements', no fixed period is mentioned. Here, the general principle of annuality could apply. In Greece, tax auditors are not bound. If tax administrations are not bound by 'other tax arrangements', they are mostly obliged to honour them. In Austria for example, the 'informal' information given by the respective authority is legally not binding (Austria has a binding 'formal ATR/APA system' as well since 2011), but protected under the principle of good faith (*Treu und Glauben*). This means that the taxpayer in general can trust the information, if it is not obviously illegal.

In general, the applicant-taxpayer is not bound by the obtained advance tax ruling, which means that he can choose not to do the transaction (but when he does, he has to do it as mentioned in the ruling request).

Third parties are in general *de iure* not bound by the ruling of another taxpayer (except in ES where third parties are bound by an individual 'consulta' when they find themselves in an identical situation as the taxpayer who did the ruling request), but we see that in some Member States authors mention that the tax ruling *de facto* has precedential value (FI).

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<sup>136</sup> For the special tax regimes, see Doran, M., 'Monitoring recent Swiss tax developments: key takeaways', *Global*

Some advance tax rulings are binding for third parties after appeal at the Supreme Administrative Court (e.g. SE).

### 3.6. Competent authority

Tax rulings could be delivered by the tax authorities in the broad sense:

- the local or central tax authorities (AT, DE, EL, IE, MT, SI, PL, ES, UK);
- the Ministry of National Economy (HU);
- some independent tax offices that are part of the tax authorities can be consulted with binding opinions (NL, LU) or can issue the ruling itself (AT, BE, EE, FR, IT, LT);
- tax rulings can be issued by an independent Council for Advance Tax Rulings with experts (SE);
- it is also possible that, depending on the tax matter on which a ruling is requested, either the normal tax administration is competent, or a specific tax office, e.g. the National Tax Board when the question is of particular importance (DK). This is the case if the ruling contains consequences for several taxpayers, the ruling deals with a bigger economic value, the ruling pertains to new legislation or questions of EU-Law, the tax topic is of public interest. The case of Finland is comparable.

### 3.7. Fee

Some Member States require a fee (AT, DE, DK, EE, FI, HU, LU, RO, SI, SE), while others do not (AT, BE, BG, HR, CY, EL, FR, IE, LV, LT, NL, PT, ES, UK, also CH).

Mostly, Member States ask for a fee for an advance tax ruling or advance pricing agreement but not for an informal arrangement.<sup>137</sup>

As mentioned in Chapter 2, the EU APA Guidelines prescribe it is for Member States to decide if a fee system is appropriate. A fee should not be a precondition for an efficient service which should be provided as a matter of course. If they are used, fees should be charged by reference to a lump sum amount as a pure entry fee and/or linked to the extra costs incurred by the tax administration as a result of the APA. Fees are particularly appropriate where without a fee a tax administration would be unable to have an APA programme, but they should not be set so high so as to be a disincentive to apply for an APA.<sup>138</sup>

### 3.8. Disclosure

Opinions on the disclosure of tax rulings differ.

In some Member States, formal advance tax rulings or advance pricing agreements are not publicly available. In that case, it is possible that policy guidelines, FAQ, general explanations, guidelines or consents are published (NL, EE, UK). In the Netherlands, a model overview of the most common advance tax rulings has been published in 2014.

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<sup>137</sup> Eglshoven, A. & Tomson, S., 'Fees for binding rulings and advance pricing agreements', *International Transfer Pricing Journal*, November/December 2011, 383-386.

<sup>138</sup> EU APA Guidelines, {SEC(2007) 246}, COM (2007) 71 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0071>.

In other Member States, disclosure is given to advance tax rulings in (abstracts in) journals (CZ), on the website of the Ministry of Finance (if they are of greater importance) (ES, FR, PL, SE), in the Public Information Bulletin (PL) or in the International Tax Rulings Bulletin of the Revenue Office (IT), or selected rulings are (summarized and anonymously) published in a database (FI, FR, IE) or in the annual report of the tax authorities (BE, LU). In Italy, for example, the bulletin summarizes (for the first time in April 2010 and for statistical purposes) the outcome of requests for the international tax ruling procedure made under Italian tax law.

In Belgium, all advance tax rulings and unilateral advance pricing agreements are published individually or in the annual report. Every publication of tax rulings is anonymous and summarized.

In general, in the case 'tax rulings' are informal 'other tax arrangements', there is no publication. However, in ES, the criteria applied in the audit proceedings are published.<sup>139</sup>

In Austria, the informative Guidance on tax rulings on international tax law of the Austrian Federal Ministry of Finance points out that information regarding the ruling will also be provided to foreign tax authorities if there is an exchange of information instrument available with the relevant state.<sup>140</sup> Austria did not prescribe the automatic exchange of information on tax rulings as a rule, but foresees some exceptions in which an automatic exchange of information should be done. This is the case for rulings on structures that are located in multiple countries and where an impact on the taxes in both countries could occur. Such a way of communication on the exchange of information on tax rulings should be encouraged in the EU Member States.

It is very difficult to discover if and which tax rulings/policies are published. It is even more difficult to find out if Member States exchange information on tax rulings spontaneously or on request. Literature on these questions is very rare.

### 3.9. Appeal

In some Member States appeal against 'tax rulings' is foreseen (AT, DK, FI, FR, IE, LT, MT, PL, PT, UK), in others it is not, or it is unclear whether it is possible (BE, BG, HR, CY, CZ, EE, EL, HU, NL, RO, ES, SE, also CH). In Finland, for example, taxpayers can go to the Board of Adjustment in every tax office, to the Administrative Court and to the Supreme Administrative Court.

However, Models of Taxpayers' Rights prescribe the possibility of judicial review (possibility of a judiciary appeal with an independent court) (Chapter 1 of this paper).

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<sup>139</sup> Grotherr, S. & Wittenstein, P., 'Veröffentlichungspraxis bei verbindlichen Auskünften (Advance Tax Rulings)', *Internationale Wirtschaftsbrieife*, No 7, 2015, 243.

<sup>140</sup> Gottholmseder, G., 'Erweiterung des Rulings gemäß § 118 BAO auf internationale Sachverhalte / Austrian ministry of finance publishes guidance on tax rulings related to international tax law', *Steuer & Wirtschaft International*, 2015, 115-117  
[https://www.bmf.gv.at/services/publikationen/Bericht\\_Steuerreformkommission.pdf](https://www.bmf.gv.at/services/publikationen/Bericht_Steuerreformkommission.pdf).

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## ANNEX : Overview table on 'Advance Tax Rulings (ATR) and other arrangements' practices in the EU

ATR and other arrangements	code	Tradition and recent developments	Legal/administrative framework	Tax topics	Binding effect on tax authority	Competent authority	Fee	Disclosure	Appeal
Austria	AT	Informal legal opinions, but also introduction of formal ATR/APA system in 2011 ('Auskunftsbescheid') - with guidance on exchange of information in 2014	Legal basis in Bundesabgabenordnung in 2011 and informative guidance of Federal Ministry of Finance of 16.12.2014/ Informal opinions without framework	International tax law: TP, group transaction, reorganisation	Yes, if the structure is realised within the timeframe set by the tax administration. Not binding for the informal opinions (only Treu und Glauben)	Competent tax administration	Yes	No, informal opinions in commercial tax journals, BUT exchange of information with foreign tax authorities if instrument is available of if ruling is on international structure	yes
Belgium	BE	Yes, informal tradition and specific ATR systems, evolution to formal ATR system in 2005	Legal framework for a federal general ATR/unilateral APA system since 24.12.2002, Flemish initiative in May 2015	For all forms of taxes (excluded topics) to all taxpayers	Individual binding force upon the Federal Tax Authorities for 5 years, exceptions /renewable	One Advance Tax Rulings Committee	No	Individual anonymous and summarized public publication or general publication in the annual report	No
Bulgaria	BG	Informal tradition with general legal basis	General legal basis for informal interpretations	Any tax topic	(Not) Binding on the tax administration, no time limit	National Revenue Agency: not binding/ Minister of Finance or Executive Director of National Revenue Agency: binding			
Croatia	HR	Informal opinions	Reforms were expected in the Tax Administration Act in 2013		Not binding - expected that opinions and instructions of the Central Office of Tax Administration is binding	Tax Administration		No	No
Cyprus	CY	Informal tradition of opinions, interpretations, circulars	No legal basis	Any tax topic	Interpretations in circulars are binding the tax administration, but interpretations are no administrative decisions - they are not definitive	Cyprus Revenue	No	No	No
Czech Republic	CZ	Formal advance answers on technical questions and informal answers	In specific income tax legislation	TP and Pes/Informal on all taxes	Binding 'official decisions'/Informal not binding	Competent local tax authorities		No, sometimes abstracts published in tax journals	No
Denmark	DK	Yes	Legal framework	Most tax topics, exceptions/specific tax topics of greater importance	Yes, up to 5 years	Tax Administration or National Tax Board (consequences for several taxpayers, bigger economic value, new legislation, questions of EU-Law, of public interest)	Yes	Some rulings are published (anonymously)	Yes
Estonia	EE		Legal (constitutional) basis for the right to request a ruling	Any tax topic, except TP	Yes (in principle)	Estonian Tax and Customs Board	Yes	FAQ, general explanations and instructions published	No
Finland	FI	Widely used and a tradition since 1940	Legal framework (Tax Procedure Act)	On most tax topics	Binding for the period mentioned in the ruling and de facto precedential value	All Tax Offices (all tax topics and valuation matters) and Central Tax Board (important tax issues)	Yes	Selected rulings are published (summarized and anonymously in database)	Yes: Board of Adjustment in every tax office, Administrative Court and Supreme Administrative Court

(cont'ed)

ATR and other arrangements	code	Tradition and recent developments	Legal/administrative framework	Tax topics	Binding effect on tax authority	Competent authority	Fee	Disclosure	Appeal
France	FR	Yes, conscious evolution	Specific legal provisions in Livre des procédures fiscales	General 'rescrits' (facts) / Specific 'rescrits' (specific issues: abuse of law, PE, R&D, ...) / Audit ruling ('accord')	General rescrit: binding, no tacit approval procedure/Specific rescrit: even tacitly binding	Tax authorities and Ruling Coordination Team		Publication of relevant rulings with general value on the website of the Direction Générale des Impôts/Central Database	
Germany	DE	Legal framework for the 'allgemeine verbindliche Auskunft'/Informal 'Verständigungen' und 'Zusagen'	Legal basis in Abgabenordnung (ATR: 2006), BMF-Schreiben of 2007	On procedure provisions or substantive tax provisions	Yes (in principle)	Competent tax office	Yes		Yes
Greece	EL	Individual responses' on written questions	No legal basis	Any tax topic	Not binding for tax auditors	Ministry of Finance	No	No	No
Hungary	HU	Before private rulings: practice of official statements with tax preferences to certain comp	Since 1996 legal framework	On (absence of) tax liabilities for future transactions	Binding for tax authorities (exception: changes in legislation or facts), unless rulings on CIT (valid for 3 years regardless of the modifications in legislation) (in principle)	Ministry for National Economy	Yes	no	Yes
Ireland	IE	Well-developed informal consultative system of advance revenue opinions	No formal legislation nor procedure/Semi-formalized advance 'revenue opinion' system by a decree with guidelines since 2002	Under tax law, advance opinions may only be obtained on certain topics/ as a matter of practice, advance opinions can be sought in respect of any tax issue	Opinions given by Revenue are not legally binding, but defences of estoppel and legitimate expectation	Revenues Commissioners	No	No disclosure or publication. However, opinions that are believed by the Revenue to be of general interest to taxpayers are usually made available on a Revenue Precedents database, or on a "no-names" basis by request under the Freedom of Information Act	No set formula for the effect of a revocation of a Revenue opinion
Italy	IT	Informal tradition	Formal procedure with legal basis since 1991, several modifications of the law	Specific matters: anti-avoidance, fictitious interposition, advertising and entertainment expenses, anti-tax haven legislation, minimum tax on dormant companies)	Yes (in principle)	International Tax Ruling Office	No	Italian Revenue Office publishes an international tax ruling bulletin	No
Latvia	LV	No, only informal statements	No legal basis/ the right to request a confirmation of their legal rights	Any tax topic	No	Tax authorities	No	No	No
Lithuania	LT	Formal evolution since 2004, Recent development: binding rulings since 2012	Legal framework since October 2011 (Law of Tax Administration)	Advance or on-going operations (ATR and on TP)	Yes (in principle)	State Tax Inspectorate	No	Not all documents/facts	Yes
Luxembourg	LU	Yes, informal tradition but evolution to formal ATR system in 2015	Legal framework for ATR/APA system since 2015, before no formal ruling procedure	Direct taxes only (income tax (incl. business taxation = transfer pricing), wealth tax, municipal business tax) – excluding VAT, registration duties, etc.	Binding the Luxembourg Tax Authorities (in principle) for 5 years	Commission des décisions anticipées will assist tax offices with the execution and the harmonized application of Luxembourg domestic and international business tax law	Yes	Anonymous summary of the advance decisions in the annual report of the Luxembourg Tax Authorities	No

(cont'ed)

ATR and other arrangements	code	Tradition and recent developments	Legal/administrative framework	Tax topics	Binding effect on tax authority	Competent authority	Fee	Disclosure	Appeal
Malta	MT	Tradition of informal technical submissions to the International Tax Unit at the Inland Revenue for a written confirmation	Legal basis in Income Tax Act for 'advance revenue rulings'	Advance revenue rulings on specific matters (participating holding, financial instruments, international business)	Advance Revenue rulings are binding for 5 years (or 2 years from the time of any modification in the statutory provisions)(in principle)	Commissioner of Inland Revenue		General consents are published	
Netherlands	NL	Long tradition of rulings and settlement agreements	Administrative decrees of 2004 (with modifications) with formal procedure	Obligatory consultation of the ATR/APA team in specific situations (participation exemptions, hybrid financing or hybrid legal entities, permanent establishment) or group financing companies and entities with limited to no real economic presence (substance requirement since 2014) as well entities with mere holding, financing and licensing functions within international groups	Binding opinions of the ATR/APA team are valid for a period of 4 to 5 years (in principle), with possible exceptions in case they cover long term contracts or in case of bilateral agreements/ renewable	Special ATR/APA team consulted by local tax authorities	No	Publication of ATR/APA Guidance (policy) + 2014: Model overview of most common ATRs published	
Poland	PL	General and individual rulings	Legal basis (Tax Ordinance Act) for a written procedure (no meeting)	Any tax topic	Rulings on future actions are binding (in principle) - tax authorities can change a ruling when the Minister of Finance finds it to be 'incorrect' at any time	General rulings: Ministry of Finance/ Individual rulings: delegated tax authorities	Yes	Published in Public Information Bulletin and anonymously on the website of the Ministry of Finance	Yes (Provincial Administrative Court)
Portugal	PT	Tradition of taxpayers' right to obtain 'information'	Legal basis for individual 'opinions'	Any specific tax topic	Binding the tax authorities (in principle)	Tax administration	No	No	No
Romania	RO	Non-binding recommendations and right to request tax ruling	Legal basis	The regulation of future tax state of facts	Yes (in principle)	Tax administration	No	No	
Slovak Republic	SK	Right on 'information', official positions, technical interpretations and advance tax agreements - ATR since September 2014	Specific tax topics (PE of a non-resident, TP, amount of advance payments, specific tax issues)		Yes (in principle)	Slovak Financial Administration and Financial Directorate of Slovak Republic	Yes, since 09/2014		
Slovenia	SI	Advance ruling system would be available							
Spain	ES	Consultas tributarias' (written opinions)	Legal basis since 1992	Any tax topic	Yes : individual consultas are binding (even for third parties), general consultas are not binding,	Direcion General de Tributos	No	Online (Ministry of Finance) published if of greater importance	No
Sweden	SE	Very long tradition of 'förhandsbekeden'	Legal framework since 1951 (modifications of the law)	All National Tax Board specific issues (national income tax, municipal income tax, national real estate tax, certain indirect taxes)	Yes (in principle) - precedential value after Supreme Administrative Court	Independant Council for Advance Tax Rulings	Yes (compensation possible, not on indirect taxes)	Publication in general terms and anonymously on the internet	Yes: Supreme Administrative Court
UK	UK	(non)statutory clearances'	Non-statutory advance clearances for businesses	Specific tax issues : the interpretation of legislation, the application of double taxation agreements; whether someone is employed or self-employed; statements of practice and extra-statutory concessions; and other areas concerning matters of major public interest in an industry or in the financial sector	Yes (in principle) (legitimate expectation)	HM Revenue & Customs	No	General consents are published, rulings may become public knowledge, formal clearances are not made public	Yes