



20.9.2021

## NOTICE TO MEMBERS

**Subject: Petition No 0497/2020 by G.N. (Italian), on behalf of the association Ditaubi, on unfair tax competition by the Netherlands and other Member States**

### 1. Summary of petition

The association to which the petitioner belongs complains of the spread of tax rulings, or advanced pricing agreements (APAs), by which multinational companies reach agreements with the tax authorities of a given country on how they will be taxed over a specific period of time in order to pay lower taxes. In particular, the signatories fear that tax havens may be created in some Member States, first and foremost the Netherlands, whereby multinationals do not pay taxes in the country(ies) in which earnings have been made. The signatories cite estimates of Dutch “tax dumping” to the detriment of other member states whereby the latter could lose up to EUR 9.2 billion in tax revenue, including estimated losses for Italy of EUR 1.38 billion. They call therefore for such tax rulings to be made illegal in the euro area and for heavy penalties to be imposed on non-compliant Member States, and for restitution of the incurred losses.

### 2. Admissibility

Declared admissible on 27 July 2020. Information requested from Commission under Rule 227(6).

### 3. Commission reply, received on 20 September 2021

#### ‘The Commission's observations

A tax ruling can be defined as ‘any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on

which they are entitled to rely<sup>1</sup>. It can consist of general rulings<sup>2</sup>, advance tax rulings<sup>3</sup> or APAs<sup>4</sup>.

The issuance of advance tax rulings is common practice, including in the European Union, as – when applied correctly - they facilitate the consistent and transparent application of tax law. Furthermore, they provide certainty for business, clarification of tax law for taxpayers and can thus encourage investment and compliance with the law. The APAs are used in the area of transfer pricing.

However, for more than two decades now, it has been recognized that tax rulings can also increase harmful tax competition due to a lack of transparency in respect of the issuance of such rulings<sup>5</sup>. For instance, a study on the administrative tax practices in taxation was already conducted on behalf of the Code of Conduct Group in 1999 and the group assessed the practices in the Member States<sup>6</sup>.

Problems can arise when a tax ruling in one country offers a significantly lower level of taxation than provided by the law or offers a tax exemption or tax deductibility which is not explicitly foreseen in the law to (harmfully) attract business activity. Consequently, as such practices often lack transparency, another country cannot take appropriate defensive measures<sup>7</sup>, such as flagging the issue in the Code of Conduct Group or applying national anti-abuse measures.

In more recent years, tackling tax evasion and boosting (tax) transparency have been a priority on the Commission's agenda and several legislative initiatives have been taken<sup>8</sup>. This includes enhanced exchange of information between tax administrations, as well as the Anti-

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<sup>1</sup> OECD (2004a), Consolidated Application Note: Guidance in Applying the 1998 Report to Preferential Tax Regimes, OECD, [www.oecd.org/ctp/harmful/30901132.pdf](http://www.oecd.org/ctp/harmful/30901132.pdf), §161, 47.

<sup>22</sup> General rulings apply to groups or types of taxpayers or activities, rather than to a specific taxpayer. They typically provide guidance on the position of the tax authority concerned on such matters as the interpretation of law and administrative practice and on their application to taxpayers generally or to a specified group of taxpayers or specified activities. (OECD (2015), Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241190-en>, §102, 48.)

<sup>3</sup> Advance tax rulings are specific to an individual taxpayer and provide a binding determination of the tax consequences of a proposed transaction. They frequently determine whether, and in some cases, how, particular law and administrative practice will be applicable to a proposed transaction undertaken by a specific taxpayer. Such rulings may also provide a determination of whether or how a general ruling applies to the facts and circumstances of a particular taxpayer. (see references note 2, §98, 47).

<sup>4</sup> An APA can be defined as “*an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time*”. (OECD (2017), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris, <http://dx.doi.org/10.1787/tpg-2017-en>, §4.134, 214).

<sup>5</sup> OECD (1998), Harmful Tax Competition: An Emerging Global Issue, 1998, OECD Publishing, Paris, <https://www.oecd.org/tax/harmful/1904176.pdf>, §63, 28.

<sup>6</sup> Report of the Code of Conduct Group (Business Taxation) to ECOFIN, 23 November 1999, 14313/99, <https://data.consilium.europa.eu/doc/document/ST-14313-1999-INIT/en/pdf>.

<sup>7</sup> OECD (2014), Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264218970-en>, 35.

<sup>8</sup> European Commission, Communication from the Commission to the European Parliament and the Council: an action plan for fair and simple taxation supporting the recovery strategy, 15 July 2020, COM(2020) 312 final, [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/2020\\_tax\\_package\\_tax\\_action\\_plan\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/2020_tax_package_tax_action_plan_en.pdf), 3.

Tax Avoidance Directive<sup>9</sup>, which provides tools against tax avoidance practices<sup>10</sup>.

More precisely regarding tax rulings, the Directive as regards mandatory automatic exchange of information was adopted in 2015<sup>11</sup>, the so-called DAC3. This Directive modified the Directive on administrative cooperation in the field of taxation<sup>12</sup> ('DAC1') and obliged the Member States to automatically exchange Advance cross-border rulings and Advance pricing arrangements using a central directory<sup>13</sup>, in line with the Organisation for Economic Co-operation and Development (OECD) BEPS Action 5<sup>14</sup>. The mandatory automatic exchange of advance cross-border rulings and advance pricing arrangements through the central directory should in each case include the communication of a defined set of basic information that would be accessible to all Member States. The introduction of a mandatory automatic exchange resulted in the recording of almost 18 000 rulings in the central directory in 2017, compared to almost no spontaneous exchanges of rulings in the years up to 2015<sup>15</sup>.

Furthermore, as mentioned before, the issuance of tax rulings is on the Code of Conduct Group's agenda as well. Following actions have been taken:

- The 1999 comparative study across Member States of administrative practices;
- the Group agreed on guidance on the identification of harmful rulings, guidance on improvements in the field of transparency and guidance on improving exchange of

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<sup>9</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, p. 1–14.

<sup>10</sup> The Anti-Tax Avoidance Directive contains five legally-binding anti-abuse measures, which all Member States should apply against common forms of aggressive tax planning. It creates a minimum level of protection against corporate tax avoidance throughout the EU, while ensuring a fairer and more stable environment for businesses. The rules consist of measures on hybrid mismatches (to prevent companies from exploiting national mismatches to avoid taxation), Controlled foreign companies (CFC) (to deter profit shifting to a low/no tax country, switchover (to tax dividends coming into the EU when they have not already been properly taxed), Exit taxation (to prevent companies from avoiding tax when re-locating assets), Interest limitation (to discourage artificial debt arrangements designed to minimise taxes) and it provides a General anti-abuse rule (to counteract aggressive tax planning when other rules do not apply). See for more information: [https://ec.europa.eu/taxation\\_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en). Furthermore, on the international level, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS ('MLI') has been developed. This allows Tax Authorities of the Member States to deny double tax treaties advantages when they esteem that these treaties are not used in accordance with their intended object and purpose. For more information: <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>.

<sup>11</sup> Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJL 332, 18.12.2015, p. 1–10.

<sup>12</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.3.2011, p. 1–12.

<sup>13</sup> [https://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation\\_en](https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en).

<sup>14</sup> OECD (2017), Exchange on Tax Rulings XML Schema: User Guide for Tax Administrations, OECD, <https://www.oecd.org/tax/exchange-of-tax-information/exchange-on-tax-rulings-xml-schema-user-guide-for-tax-administrations.pdf>, 8.

<sup>15</sup> European Commission, Report from the Commission to the European Parliament and the Council: on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation, 17 December 2018, COM(2018) 844 final, [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/report-automatic-exchanges-taxation-dac-844\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/report-automatic-exchanges-taxation-dac-844_en.pdf), 11.

information for cross-border rulings<sup>16</sup>;

- the Group agreed on a model instruction for the spontaneous exchange of information on tax rulings (which is however no longer of any interest since the adoption of DAC3 which provides for the automatic exchange of such rulings)<sup>17</sup>;
- the Group agreed in September 2016 on the conditions and rules for the issuance of tax rulings as the Group wants to increase the transparency regarding the rulings issued in the Member States<sup>18</sup>.

The aim of these September 2016 guidelines is to make sure that sufficient transparency is provided and to limit the risks that the issuance of tax rulings would result in harmful tax practices. In order to monitor their implementation, a questionnaire was sent to the Member States by the Commission Services. The responses of the Member States were reviewed by the Code of Conduct Group in 2020. The Group concluded that all Member States were compliant with the 2016 Guidelines.<sup>19</sup>

In addition, as part of the European Semester process, the Commission adopted proposals for country specific recommendations on aggressive tax planning for six Member States, including the Netherlands, in 2019 and in 2020, which have been adopted by the Council.

Furthermore, while Member States have exclusive competence in the field of direct taxation, they must exercise their competences in respect of EU law, including State aid rules. If Member States give certain multinational companies tax advantages not available to their competitors, this harms fair competition in the EU in breach of State aid rules.

Following public allegations of favourable tax treatment of certain multinationals (in particular in the form of tax rulings), the Commission has been reviewing, in the past few years, whether the tax ruling practices of Member States are in line with the State aid rules.

The Commission has opened three formal investigations into tax rulings granted by the Dutch tax authorities<sup>20 21</sup>. Over the past years, the Netherlands have undertaken a thorough review of

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<sup>16</sup> Agreed guidance by the Code of Conduct Group (business taxation): 1998-2018, <http://data.consilium.europa.eu/doc/document/ST-5814-2018-REV-2/en/pdf>, 21 – 24.

<sup>17</sup> Agreed guidance by the Code of Conduct Group (business taxation): 1998-2018, <http://data.consilium.europa.eu/doc/document/ST-5814-2018-REV-2/en/pdf>, 29 – 38.

<sup>18</sup> Guidelines on the Conditions and Rules for the Issuance of Tax Rulings – Standard Requirements for good practice by Member States, agreed at the meeting on 21 September 2016, Report Code of Conduct Group (Business Taxation) to the Permanent Representatives Committee/Council, 28 November 2016, 14750/16, <https://data.consilium.europa.eu/doc/document/ST-14750-2016-INIT/en/pdf>.

<sup>19</sup> Report from the General Secretariat of the Council to the Delegations, 20 November 2020, 13151/20, <https://data.consilium.europa.eu/doc/document/ST-13151-2020-INIT/en/pdf>, §21.

<sup>20</sup> As regards final decisions (following a formal investigation), please refer to the decision in Starbucks of 21 October 2015 (negative decision with recovery) published in the Official Journal of the European Union of 29 March 2017 (OJ L 83, 29.3.2017, p. 38). The General Court annulled that decision by its judgment of 24 September 2019, Joined Cases T-760/16 and T-636/16, EU:T:2019:669).

<sup>21</sup> As regards ongoing formal investigations, please refer the decision of 18 December 2017 to initiate the formal investigation procedure in Inter IKEA, as published in the Official Journal of the European Union of 6 April 2018 (OJ C 121, 6.4.2018, p. 30). Please also refer to the decision of 10 January 2019 to initiate the formal investigation procedure in NIKE, as published in the Official Journal of the European Union of 5 July 2019 (OJ C 226, 5.7.2019, p. 31).

their tax rulings practice to address national and international concerns<sup>22</sup>. The Commission welcomes these amendments and will continue to review their practical implementation and effect.

In terms of secondary legislation, the only EU law provisions closely linked to tax rulings and APAs are contained in the abovementioned DAC3. In this regard, it may be noted that there are no valid reasons to initiate infringement proceedings since the Netherlands have transposed the Directive on time, in conformity with the text of the Directive and are exchanging information on tax rulings through the central directory. It may also be noted that under DAC3, the Commission does not have access to the contents of the rulings and APAs.

### Conclusion

The Commission is aware of the potential harmful impact of tax rulings where they lack transparency and provide for tax advantages which are not foreseen by law.

In recent years, important steps have been taken to address the harmful impact of tax rulings by adopting the DAC3 (2015) and by closely following up of the ruling practices of Member States in the Code of Conduct Group.

These tools enable the Member States to challenge tax avoidance schemes, which make use of tax rulings in other Member States. In addition, the Commission assesses each Member State in the context of the European Semester, and where appropriate, proposes to the Council country specific recommendations. However, it falls within the competence of the national tax authorities to tackle individual cases of abuse<sup>23</sup>.

Since the end of 2014, the Commission has systematically reviewed tax rulings in all Member States. Where the Commission had doubts on the legality of tax rulings, it has opened formal investigations. The Commission will continue to review whether tax rulings issued by Member States comply with EU State aid rules. Given that the Netherlands have transposed DAC3 adequately into its national legislation and it continues to observe its obligation under that Directive to exchange information on tax rulings, there is no breach of EU law that would warrant infringement proceedings with regard to that Directive.

The Commission services monitor the exchange of information under the Directive on administrative cooperation and analyse potential needs to improve reporting in cooperation with Member States. In that respect, the Commission proposed in July 2020 some improvements in the reporting of ruling-related information (DAC7 proposal) which have been adopted on 22 March 2021.<sup>24</sup> In addition a number of initiatives under the Fiscalis programme are currently looking into the improvement of the collection and the use of information received by Member States. These initiatives will be followed up by the Commission in line with the 2020 Action Plan.’

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<sup>22</sup> See, for example, Kamerstukken II, 2018/19, 25 087, nr. 237.

<sup>23</sup> Nevertheless, it should be noted that if a Member State fails to use its competence to tackle abuse, that can under certain conditions amount to State aid, which can be addressed by the Commission.

<sup>24</sup> Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ST/12908/2020/INIT, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021L0514&qid=1629726950859>