
Leandra Lederman
Indiana University Maurer School of Law

September 29, 2020
Via Zoom
Time: 2:00 – 3:50 p.m. EST
Week 6
SCHEDULE FOR FALL 2020 NYU TAX POLICY COLLOQUIUM
(All sessions meet online on Tuesdays, from 2:00 to 3:50 pm EST)


2. Tuesday, September 1 – Clinton Wallace, University of South Carolina School of Law. “Democratic Justice in Tax Policymaking.”

3. Tuesday, September 8 – Natasha Sarin, University of Pennsylvania Law School. “Understanding the Revenue Potential of Tax Compliance Investments.”

4. Tuesday, September 15 – Adam Kern, Princeton Politics Department and NYU Law School. “Illusions of Justice in International Taxation.”


7. Tuesday, October 6 – Daniel Shaviro, NYU Law School. “What Are Minimum Taxes, and Why Might One Favor or Disfavor Them?”


9. Tuesday, October 20 – Michelle Layser, University of Illinois College of Law. “How Place-Based Tax Incentives Can Reduce Economic Inequality.”


Of Risks and Remedies: Best Practices in Tax Rulings Transparency

Leandra Lederman*

ABSTRACT

The phrase “international scandal” hardly brings to mind tax rulings. It is not just that tax rulings may seem arcane, they are also a legitimate tax administration tool. Advance tax rulings provide certainty to taxpayers and the tax administration on the tax treatment of a planned transaction, lowering costs on both sides. Advance tax rulings are therefore openly used by many countries, including the United States and numerous European countries. Yet, secrecy that is followed by criticism and often by revelations that may embarrass a country’s leaders is a recurring aspect of these rulings. The United States has experienced this, and keeps Advance Pricing Agreements (APAs) confidential, while publishing letter rulings in anonymized form.

The 2014 “LuxLeaks” scandal, revealing what the press sometimes termed “sweetheart deals” between the Luxembourg tax authority and multinational companies, is probably the best-known scandal regarding tax rulings. LuxLeaks helped trigger legal changes that require tax authorities, including those of European countries and the United States, to automatically share information about cross-border advance rulings with other countries’ tax authorities. Luxembourg’s tax rulings, along with U.S. APAs, otherwise remain confidential.

The pattern—in the United States, Luxembourg, and elsewhere—of nondisclosure of tax rulings followed by revelations of documents helps inform the question of what level of transparency of tax rulings is appropriate. This Article accordingly (1) develops a typology of risks of opaque rulings; (2) catalogues the levels of possible disclosure, connecting each level with the risks it would address; and (3) examines the possible costs of tax ruling transparency. It argues that best practices include disclosing anonymized letter rulings and, at a minimum, the transfer-pricing methodologies a tax administration has approved in APAs.

* William W. Oliver Professor of Tax Law, Indiana University Maurer School of Law. This project was supported in part by a research grant provided by the Fulbright Belgium/Luxembourg Commission. The author thanks Werner Haslehner for hosting her at the University of Luxembourg and for many helpful discussions. She is grateful to Nicholas Almendares, Antonio Ancora, Jennifer Bird-Pollan, Stephen Daly, Charles Geyh, Heather Field, Ruth Mason, Katerina Pantazatou, Emily Satterthwaite, Julia Sinnig [and ...] for helpful comments on prior drafts. She is also grateful for helpful discussions with William Byrnes, Ana Paula Dourado, Hans Gribnau, Jayanth Krishnan, Leopoldo Parada, [and ...], as well as participants in a seminar at the University of Luxembourg; a faculty workshop at the Indiana University Maurer School of Law; a roundtable at the Southeastern Association of Law Schools conference; the 2020 Tax Research Network conference; and the U.C. Hastings College of the Law Tax Speaker Series. Maurer Law students Steven Bassett, Sandra Francisco, Mantas Grigorovicius, Derrick Hou, George Krug, Sarah Taylor, and Thibault Vielledent provided helpful research assistance. This is a preliminary draft. Comments are welcome at llederma@indiana.edu.
INTRODUCTION

Many countries, including the United States, use tax rulings. A ruling provides certainty for the requesting taxpayer and avoids the potential cost of auditing that issue. Should these rulings be considered confidential tax information, guidance available to the general public, or something in between? Some countries publish some of their tax rulings, while others traditionally have kept them confidential, sometimes as part of an obscure process.

In 2014, the small European country of Luxembourg made international headline news when the International Consortium of Investigative Journalists (ICIJ) released hundreds of previously confidential tax rulings that the Luxembourg tax administration had granted.\(^1\) Antoine Deltour, a citizen of France and former junior auditor at the Luxembourg office of Big Four accounting firm PwC, was soon accused of providing documents relating to 340 taxpayers to Edouard Perrin, a French journalist, who gave them to the ICIJ.\(^2\) Raphaël Halet, another former PwC employee, was accused of leaking additional documents.\(^3\) Halet reportedly did so after seeing an exposé of Luxembourg’s rulings process that Perrin ran on French television in 2012.\(^4\) Halet allegedly downloaded the tax returns of several major corporations and shared them with Perrin,\(^5\) who subsequently gave those tax returns to the ICIJ.\(^6\)

The explosive November 2014 news stories were followed by a statement by Luxembourg’s Ministry of Finance that “[t]he practice of advance tax decisions (‘rulings’) is well established in many countries, including Luxembourg. In these decisions, the tax


\(^{5}\) Marks, supra note 3 (“[O]ne afternoon inside PwC’s Luxembourg offices, Halet accessed the company server and downloaded 16 corporate tax returns showing exactly how much companies had avoided paying in taxes by transferring profits through Luxembourg.”).

\(^{6}\) Id.
administration sets out how it intends to apply the existing national and international tax rules to a specific situation.\footnote{Luxembourg Ministry of Finance Position Paper on the Luxembourg’s Government Position on the Practice of Issuing Tax Rulings 1 (Dec. 10, 2014), http://www.europaforum.public.lu/fr/actualites/2014/12/gouv-ruling-luxleaks-prises-positions/position-paper-transparency-and-rulings.pdf (hereinafter, Luxembourg Ministry of Finance Position Paper).} Criminal prosecutions of Perrin, the journalist, and alleged whistleblowers Deltour and Halet also followed.\footnote{Jim Brunsden, Luxleaks: Luxembourg’s Response to an International Tax Scandal, https://www.ft.com/content/de228b90 (June 23, 2017).} The trial court acquitted Perrin, the journalist.\footnote{Id.} However, it found Deltour and Halet guilty of theft and other crimes and gave them suspended sentences.\footnote{Josh White, LuxLeaks Verdict Sets ‘Strong Precedent’, Says Acquitted ex-PwC Whistleblower Antoine Deltour, INT’L TAX REV. (May 15, 2018), http://www.internationaltaxreview.com/Article/3807187/LuxLeaks-verdict-sets-strong-precedent-says-acquitted-ex-PwC-whistleblower-Antoine-Deltour.html. Another study of the LuxLeaks rulings examined “about 6,000 pages” relating to 123 firms. Inga Hardeck & Patrick U. Wittenstein, Assessing the Tax Benefits of Hybrid Arrangements—Evidence From the Luxembourg Leaks, 71 NAT’L TAX J. 295, 297-98 (2018).} The judgment initially was upheld on appeal in Luxembourg.\footnote{Id. Luxembourg’s Cour de Cassation is the highest court of appeal in its judicial branch. See The Grand Duchy of Luxembourg, Courts and Tribunals, https://gouvernement.lu/en/systeme-politique/cours-tribunaux.html (last visited July 20, 2020).} Deltour’s conviction was subsequently quashed by Luxembourg’s Cour de Cassation, and he was given whistleblower status, but Halet’s conviction was upheld.\footnote{See infra text accompanying note 283 (citing OECD figures on “past rulings” exchanged); see also Marian, supra note 2, at 8 (“The leaked ATAs were made available by the ICIJ in two batches. The first, which included 548 documents issued to 340 MNCs, was made public in November 2014.”).}

What became known as the “LuxLeaks” scandal, and the events that followed, revealed that Luxembourg had granted thousands of tax rulings to multinational companies over a period of several years.\footnote{Professor Omri Marian uses as an illustrative example a 2009 ruling issued to ABRY Partners. See Marian, supra note 2, at App. B. That ruling contains 21 pages. See Luxembourg Leaks Database, https://www.documentcloud.org/documents/1345263-abry-partners-2009-tax-ruling.html. Another study of the LuxLeaks rulings examined “about 6,000 pages” relating to 123 firms. Inga Hardeck & Patrick U. Wittenstein, Assessing the Tax Benefits of Hybrid Arrangements—Evidence From the Luxembourg Leaks, 71 NAT’L TAX J. 295, 297-98 (2018).} The LuxLeaks database reveals that these Advance Tax Agreements (ATAs) often were lengthy\footnote{Professor Omri Marian examined a sample of 172 rulings. Marian, supra note 2, at 2. The rulings in his sample contained a mean number of issues of 4.93, a median of 5, and a mode of 5. The range was zero issues (only one ruling) to 16 issues (also one ruling). Rulings containing 4 to 6 issues collectively comprised 47.09% of his sample. These figures were calculated using Professor Marian’s raw data. The author thanks him for allowing her access to the data.} and contained multiple issues.\footnote{What became known as the “LuxLeaks” scandal, and the events that followed, revealed that Luxembourg had granted thousands of tax rulings to multinational companies over a period of several years. The LuxLeaks database reveals that these Advance Tax Agreements (ATAs) often were lengthy and contained multiple issues. However, the process was surprisingly
rapid: Professor Omri Marian found in his sample of 172 ATAs in the ICIJ database\textsuperscript{16} that “about 40\% \ldots \text{were approved the same day they were submitted.}”\textsuperscript{17} In fact, the \textit{Lëtzebuerger Land} newspaper reported that “[w]ith a little luck, we could put through ‘a good fifteen rulings in two hours,’ recalls a business lawyer.”\textsuperscript{18} Moreover, the rulings produced valuable tax revenue for Luxembourg. The \textit{Wall Street Journal} quoted a Luxembourg tax lawyer as stating that “[t]he corporate structures \ldots \text{approved [in these rulings] account[ed] for up to 80\% of Luxembourg’s €1.5 billion in annual corporate tax revenue\ldots}.”\textsuperscript{19}

Traditionally, governments prioritized taxpayer confidentiality, keeping rulings private.\textsuperscript{20} However, a lack of transparency poses its own risks. LuxLeaks helped launch international discussions about rulings transparency, as well as fostering legal change. In recent years, tax authorities, including those of European countries and the United States, have been required by the European Commission and the Organisation for Economic Cooperation and Development (OECD) to automatically share information about cross-border advance rulings with other countries’ tax authorities.\textsuperscript{21} As discussed in this Article, this information-exchange approach targets an important set of risks that nontransparent tax rulings pose to other countries, but it fails to address all of the risks that opaque tax rulings pose to countries, tax advisers, and taxpayers.

This Article makes several original contributions. First, the Article develops an original typology of the risks of nontransparent tax rulings. In doing so, it draws on additional instances in the tax rulings context of secrecy followed by revelations—in the United States, Luxembourg,

\textsuperscript{16} Marian, \textit{supra} note 2, at 2.
\textsuperscript{17} \textit{Id.} at 20. By contrast, U.S. tax rulings, whether letter rulings or Advance Pricing Agreements (APAs) typically take months to complete. \textit{See TIGTA, Chief Counsel Can Take Actions to Improve the Timeliness of Private Letter Rulings and Potentially Reduce the Number Issued} (Sept. 10, 2010), https://www.treasury.gov/tigta/auditreports/2010reports/201010106fr.html (“In 35 (54 percent) of the 65 cases [examined], Counsel took from 121 to 180 calendar days to provide the taxpayer with the letter ruling…. 15 (23 percent) of the 65 cases took longer than the 180-calendar day goal to close the case (ranging from 199 to 3,548 calendar days \ldots’’); IRS, \textit{Announcement and Report Concerning Advance Pricing Agreements} 12 (2019), https://www.irs.gov/pub/irs-drop/a-19-03.pdf (hereinafter, IRS, APA Announcement) (reporting that APAs took an average of 32 to 45 months to complete, depending on the type of APA and whether or not it was a renewal of an existing APA).
\textsuperscript{20} \textit{See infra} notes 75-76 and accompanying text (APAs generally are kept confidential); \textit{infra} text accompanying notes 333-334 (discussing pre-1976 U.S. tradition of confidential letter rulings); \textit{infra} text accompanying notes 344-345 (quoting 1995 OECD statement urging confidentiality in APA context); 111 Cong. Rec. 11811 (1965) (statement of Mr. Gore) (“[IRS] Commissioner Cohen, in testifying before the Finance Committee \ldots \text{stated that in applying for a ruling the taxpayer ‘bares his soul.’ The implication seemed to be that a ruling contained material that could not be published.’”).
\textsuperscript{21} \textit{See infra} Part III.A.1.
and other European countries. This pattern, and what has been revealed by leaks and other disclosures, helps inform the degrees of transparency tax rulings could have. Second, the Article develops a spectrum of rulings transparency and analyzes what level of transparency would address which risks. Third, the Article catalogs and interrogates potential costs of rulings transparency. Fourth, drawing on this framework, the Article analyzes what best practices in rulings transparency should look like—an issue that should matter to the many countries and subnational governments that issue tax rulings.

The remainder of the Article proceeds as follows: Part I of the Article provides background on advance tax rulings and Advance Pricing Agreements (APAs), and discusses the differing transparency of these rulings at the federal level in the United States. In Part II, the Article identifies and develops a typology of the risks of nontransparent tax rulings—to countries, taxpayers, and tax advisers. Part III sets out a range of possible disclosure remedies that respond to some or all of those risks. This Part also considers possible costs of transparency, including the argument some have made that publication of tax rulings would reduce demand for them, which U.S. data does not support. The Article concludes that best practices include anonymized publication of letter rulings and publication of at least the transfer pricing methodologies approved in APAs.

I. TAX RULINGS AND ADVANCE PRICING AGREEMENTS

A. A Primer on Tax Rulings and APAs

Tax rulings are a type of ex ante legal guidance provided to a taxpayer. Unlike general, published guidance, rulings are tailored to the requesting taxpayer’s situation. There are two principle types of tax rulings issued to specific taxpayers: advance tax rulings (also called letter rulings) and APAs. Both are used by countries all over the world.

1. Advance Tax Rulings

The OECD defines the term “advance ruling” as follows: “A letter ruling, which is a written statement, issued to a taxpayer by tax authorities, that interprets and applies the tax law to a specific set of facts.” That is, advance tax rulings are taxpayer-specific rulings that allow the

---

22 See infra text accompanying notes 150-167.
24 This article uses the term “ruling” or “tax ruling” to refer to both letter rulings and APAs.
25 OECD, Glossary of Tax Terms, http://www.oecd.org/ctp/glossaryoftaxterms.htm#L. The Internal Revenue Service defines the term “letter ruling” as follows: A “letter ruling” is a written determination issued to a taxpayer by an Associate office in response to the taxpayer’s written inquiry, filed prior to the filing of returns or reports that are required by the tax laws, about its status for tax purposes or the tax effects of its acts or transactions. A letter ruling interprets the tax laws and applies them to the taxpayer’s specific set of facts. Rev. Proc. 2019-1, 2019-01 I.R.B. 1 § 2.01 (Jan. 2, 2019). In the United States, letter rulings are also referred to as private letter rulings (PLRs). See Joshua D. Blank, The Timing of Tax Transparency, 90 S.
taxpayer receiving the ruling to obtain assurance about the tax treatment of a transaction, typically before undertaking the transaction. For example, a company seeking to restructure may seek a ruling that the planned restructuring will receive the tax treatment contemplated.

Letter rulings are valuable to both the taxpayer and the tax administration. Certainty for taxpayers is commonly cited as an important justification for a tax rulings program. However, that is not the only benefit. For example, one article argues that, in addition to offering “certainty as an aid to business,” tax rulings may serve:

1. to make it easier for taxpayers to compute their taxes correctly in the first instance and thereby to promote voluntary compliance; and
2. to lay the groundwork for fair and economical tax administration by placing within the knowledge of both taxpayers and examining officers principles to be applied in the enforcement of tax laws and in the settlement of disputes ....

In effect, tax rulings eliminate some uncertainty, and therefore risk, for both the taxpayer and the tax administration. One commentator called rulings “an indispensable tool in the modern world of tax administration and compliance.”

2. Advance Pricing Agreements

APAs are similar to letter rulings but reflect an agreement between the taxpayer and one or more tax administrations regarding intercompany (transfer) pricing. Transfer pricing is what

---


27 Gerald G. Portney, Letter Rulings: An Endangered Species?, 36 TAX LAW. 751, 754-55 (1983); see also Mitchell Rogovin, The Four R's: Regulations, Rulings, Reliance and Retroactivity, 43 TAXES 756, 765 (1965) (then-Chief Counsel of the IRS listed five benefits to the government of the rulings program, including decreasing the volume of tax litigation, simplifying audits, and “keeping [the IRS] abreast of the kinds of transactions which are being consummated or considered by taxpayers”).

28 See, e.g., Carlo Biz, Countering Tax Avoidance at the EU Level after ‘Luxleaks’: A History of Tax Rulings, Transparency and BEPS: Base Erosion Profit Shifting or Bending European Prospective Solutions?, 12 Drittio E Practica Tributaria Internazionale 1035, 1040 (2015) (citing the benefits in the tax rulings contexts of legal certainty, predictability, and “legitimate expectation.”); Antoine Deltour, Whistleblowing on Luxembourg’s Tax Practices, ROY KROVEL & MONA THOWSEN, MAKING TRANSPARENCY POSSIBLE: AN INTERDISCIPLINARY DIALOGUE 82 (2019) (“This practice [of issuing tax rulings] has a certain legitimacy because it gives the applicant company legal certainty as to how its often complex operations will be taxed in the future.”).


30 Id.


allocates the tax base of a multinational enterprise among the various countries involved. Transfer pricing has been called “one of the most significant problems in modern international taxation.” Professor Adam Rosenzweig provides the following simple example:

[A]ssume a company manufactures widgets in Country A and sells those widgets in Country B. It costs $200 to manufacture a widget in Country A, and it can be sold for $700 in Country B, for a total of $500 worldwide profit per widget. Which country is entitled to tax that $500?

The company, Country A, and Country B all have an interest in the answer to this question. The taxpayer company will not want to be taxed twice on the same amount, and Country A and Country B both have potential tax to collect. Transfer pricing is what allocates the $500 between the two countries. To accomplish that, “a hypothetical intermediate step is added,” so that the widget is deemed to be transferred from the manufacturer to a hypothetical retailer in Country B that then sells it to the consumer. The hypothetical price at which the (fictional) retailer bought the product is what determines how much of the $500 of profit is allocated to Country A and how much to Country B.

The company is not indifferent about the allocation of profits because countries’ tax rates differ. The taxpayer’s incentive is to set the hypothetical price so as to locate most of the profit in the lower-taxed jurisdiction. For example, if Country A in Rosenzweig’s example is a low-tax

(APAs) are pre-transaction agreements about acceptable transfer pricing methods for a given time period.”

Adam H. Rosenzweig, Conceptualizing a New Institutional Framework for International Taxation: An Antigua Gambling Model for the International Tax Regime, 44 WASH. U. J. L. & POL’Y 79, 84 (2014). Large multinational companies may have hundreds of related entities in dozens of countries. “For example, the Britain-based banking and financial services company HSBC is composed of at least 828 legal corporate entities in 71 countries. The largest brewing company in the world, Anheuser-Busch InBev, consists of at least 680 corporate entities involving 60 countries.” Javier Garcia-Bernardo et al., Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network, 7 SCI. REP. 1, 1 (2017).


Rosenzweig, supra note 33, at 84.


Rosenzweig, supra note 33, at 84.

Id. at 86.

Id.

In the example provided by Rosenweig, “assume the retail price was $300. The sale from Country A to Country B would generate $100 of profit, which Country A would tax. The retail store in Country B would have a profit of $400 from selling the widget it bought for $300 for $700.”

Id. at 86.

Diane M. Ring, On The Frontier of Procedural Innovation: Advance Pricing Agreements and The Struggle To Allocate Income For Cross Border Taxation, 21 MICH. J. INT’L
jurisdiction and Country B is a high-tax jurisdiction, the taxpayer has an incentive to treat the price on the hypothetical sale from Country A to the store in Country B as a high amount—say $650. If respected, this would mean that $450 is taxed in low-tax Country A, while only $50 is taxed in high-tax Country B.43

Transfer pricing is necessarily fact-sensitive. “In general, transfer pricing rules are based on the ‘arm’s length’ principle. This principle stipulates that prices are not artificially manipulated when they resemble prices which are set as if companies were independent of each other, i.e. at arm’s length.”44 These prices, because they are based on counterfactuals, lack a single precise answer. They are thus a potential source of dispute risk.

Taxpayers set transfer prices in the first instance. Governments can try to respond to alleged abuses by questioning the transfer prices companies determine, but this could result in expensive and protracted litigation.45 The APA process allows advance agreement on the transfer price. It is thus “an alternative to the standard taxpayer path of doing the transactions, filing a return, facing audit . . . and, finally, possible appeal with settlement or litigation.”46 This is

---

42 That is, $650 minus the $200 production cost provided in the example. See supra text accompanying note 35.

43 That is, the $700 sales prices provided in the example, see supra text accompanying note 35, minus $650.

44 Phedon Nicolaides, State Aid Rules and Tax Rulings, 2016 EUR. ST. AID L.Q. 416, 416 (2016). In the U.S. federal income tax, Code section 482 allows the IRS to “distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among . . . organizations, trades, or businesses” that are “owned or controlled directly or indirectly by the same interests” if the IRS “determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.” I.R.C. § 482.

45 For example, the company “GSK [GlaxoSmithKline] and the IRS argued for fourteen years over the correct transfer prices the U.S. subsidiary paid to its United Kingdom parent for several drugs.” Sharon Burnett & Darlene Pulliam, Transfer Pricing Seven Years After Glaxo Smith Kline, 41 S.W. ECON. REV. 99, 99 (2014); Richard C. Stark et al., Consistency, Sunshine, Privacy, Secret Law, and the APA Program, 61 TAX NOTES INT’L 1049, 1064 (2011) (“Litigating this type of case is extraordinarily costly and time-consuming for the taxpayer, the IRS, and the courts for many reasons . . . “).

46 Ring, supra note 41, at 147.
attractive to both the tax administration and the taxpayer. In fact, one commentator stated that “[p]erhaps the most interesting aspect of APAs is that taxpayers and the IRS both seem to love them. In a world in which those two sides often vigorously oppose each other, seldom does one find an area in which rivals so clearly converge.”

The APA was “introduced in the United States in 1991 . . . . Following the introduction of these agreements in the United States, similar procedures were gradually adopted in other countries, and by 2007 advance pricing agreements were offered in many countries around the world.” The OECD has defined the term “APA” as “[a]n arrangement that determines, in advance of controlled transactions, an appropriate set of criteria . . . for the determination of the transfer pricing for those transactions for a fixed period of time.” APAs typically involve significant amounts of money. U.S. APAs typically cover periods of three to five years. Companies value the legal certainty that such an advance agreement produces. Relatedly, having an APA reduces the volume of uncertain tax positions a taxpayer needs to disclose.

There are distinct types of APAs, and they differ by how many parties are involved. A “unilateral” APA involves only the taxpayer and one tax authority. For example, a unilateral

---

47 See id. at 148 (stating in part that “governments …. now look to the APA program to provide less costly dispute resolution and to enhance their information base for future improvements to the taxation of related party transactions.


49 Givati, supra note 34, at 142-43.


51 See Blank, supra note 25, at 514 (“Advance Pricing Agreements are among the most economically valuable forms of ex ante tax administration.”).

52 Id. The period may be even longer. See Matthew Frank et al., Insight: Advance Pricing Arrangement Series: Americas, DAILY TAX REP. (BLOOMBERG LAW), June 21, 2019 (“It is now not unusual for an APA term to be 10 years or more—and this was a feature of 17 of the 107 [U.S.] APAs executed in 2018.”). Some APAs lack an end date. See Lorraine Eden & William Byrnes, Transfer Pricing and State Aid: The Unintended Consequences of Advance Pricing Agreements, 25 TRANSNAT’L CORPS. 9, 23-24 (2018), https://doi.org/10.18356/7fb86b3d-en.

53 Givati, supra note 34, at 147 (“The advance ruling process is understood to be important for many reasons, but especially because taxpayers can achieve legal certainty regarding the tax consequences of contemplated transactions by using it.”).

54 Susan C. Borkowski & Mary Anne Gaffney, FIN 48, Uncertainty, and Transfer Pricing: (Im)Perfect Together?, 21 J. INT’L ACCT., AUD. & TAX’N. 32, 37 (2012) (“APAs may be used by TNCs [(transnational companies) to minimize the uncertainty arising from their cross-border TP [(transfer pricing) activities, and therefore reduce their UTPs [(uncertain tax positions)].”)

55 See OECD, supra note 50, at 23 (“An advance pricing arrangement may be unilateral involving one tax administration and a taxpayer or multilateral involving the agreement of two or more tax administrations.”).
U.S. APA would involve the taxpayer and the IRS. In the United States, the Competent Authority is the Deputy Commissioner of the IRS. An agreement among Competent Authorities “is normally based on the mutual agreement provision of tax treaties between the jurisdictions.” Only bilateral and multilateral APAs . . . can provide legal certainty as to how the tax authorities of countries involved consider the taxpayer-specific application of a TPM [transfer-pricing method].

Professor Diane Ring has explained the APA process as follows:

The taxpayer initiates the APA process by approaching the [Internal Revenue] Service (and typically the corresponding tax authorities in the other relevant jurisdictions) before engaging in the related party transactions potentially at issue. At this point the taxpayer voluntarily provides detailed information to the governments regarding its business activities, plans, competitors, market conditions, and prior tax circumstances. The critical piece of this presentation is the taxpayer’s explanation of its planned pricing method. Following discussion and negotiation, the parties hopefully reach agreement on how the taxpayer should handle the pricing of these anticipated related party transactions.

Although both letter rulings and APAs are types of rulings, they do have differences. The OECD has described the main differences between letter rulings and APAs:

An APA generally deals with factual issues, whereas more traditional private rulings tend to be limited to addressing questions of a legal nature based on facts presented by a taxpayer. The facts underlying a private ruling may not be questioned by the tax administration, whereas in an APA the facts are likely to be

---

56 Andrew B. Whitford, Critical Issues in Comparative & International Taxation: The Reduction of Regulatory Uncertainty: Evidence from Transfer Pricing Policy, 55 St. Louis L.J. 269, 286 (2010) (“A unilateral APA involves one tax authority and a taxpayer; a bilateral or multilateral APA involves two or more tax authorities.”).

57 See Todd Welty et al., Evaluating and Leveraging Alternative Dispute Resolution Options in Tax Disputes Involving Financial Institutions, J. Tax’n & Reg. Fin. Inst., May-June 2012, at 25, 31 (explaining, in the U.S. context, that “[a] bilateral or multilateral APA involves a request for an APA between the taxpayer, the [Internal Revenue] Service, and a mutual agreement between relevant foreign competent authorities, whereas a unilateral APA involves only the IRS and the taxpayer, and does not prevent foreign tax administrations from taking a different position.”).

58 Id.


61 Id.

62 Ring, supra note 41, at 147 (footnote omitted).

63 Allison Christians, Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time, 76 Tax Notes Int’l 1123, 1124 (2014) (stating that “advance pricing agreements . . . are a kind of private letter ruling”).
thoroughly analysed and investigated. In addition, an APA usually covers several transactions, several types of transactions on a continuing basis, or all of a taxpayer’s international transactions for a period of time. In contrast, a private ruling request usually is binding only for a particular transaction.  

3. Concerns Raised by Rulings

In principle, the parties negotiating rulings or APAs should have adverse interests, with the tax administration seeking to prevent the taxpayer from reducing the tax base in that country. However, that assumes both that the tax administration wants to maximize revenue in every case and that the tax base is fixed. Because they are individualized, tax rulings can be used to provide special deals. Moreover, a tax administration can tax profits that would otherwise be taxed elsewhere by providing a ruling that has the effect of shifting profits into the jurisdiction and offering a low rate of tax on the profits shifted—much lower than statutory rates.

For example, Luxembourg’s applicable statutory tax rate amounted to about 29% during the period of the leaked rulings. However, LuxLeaks whistleblower Antoine Deltour described “a virtual absence of taxation, which is very common in Luxembourg. As an auditor, I worked for a client with an effective tax rate of about 3%. And journalists who surveyed the other [LuxLeaks] documents calculated an effective rate of 0.0156 per cent, or zero.” Such a low effective tax rate can occur by allowing for low, negotiated margins to be subject to tax in the country. Omri Marian found that “Luxembourg’s … practice allowed for … taxable margins … as low as 0.015625 percent.”

---

64 OECD, supra note 50, at 216.

65 Christians, supra note 63, at 1124 (referring to “a known issue for international tax law: Far too much of it seems to involve secret deals among specific taxpayers and governments, to the detriment of the public at large.”); Ruth Mason, Identifying Illegal Subsidies, 69 Am. U. L. Rev. 479, 515 (2019) (“Due to their obscurity, the complexity of the laws they apply, their confidentiality, and their application to only a single taxpayer, tax rulings represent an ideal mechanism for governments to deliver benefits to a favored taxpayer while denying similar treatment to the taxpayer’s competitors.”).

66 For example, Ruth Mason and Stephen Daly discuss the European “[C]ommission’s early assertion that the Irish Revenue Commissioners and Apple had ‘reverse engineered’ the agreed formula for taxable profits in 1991” in a transfer pricing ruling. Ruth Mason & Stephen Daly, State Aid: The General Court Decision in Apple, 168 Tax Notes Fed. 1791, 1800 (2020).

67 Omri Marian, Is Something Rotten in the Grand Duchy of Luxembourg?, 84 Tax Notes Int’l 281, 286 (2016) (“Luxembourg’s corporate tax rates [were] … about 29 percent combined national and local rate during the period relevant to the leaks ….”).

68 Deltour, supra note 28, at 82-83.

69 See Marian, supra note 2, at 38 (“Effectively, a margin determination is an agreement by Luxembourg to a fixed formula that determines, in advance, the amount of taxes to be paid by the sponsor [taxpayer]) in Luxembourg…. The determination of the taxable spread seems to depend solely on the face amount of financing made through Luxembourg. The spread diminishes as the amount financed through Luxembourg increases.”).

70 Marian, supra note 67, at 286.
This form of tax competition is a particular risk with unilateral rulings because only one country’s tax administration is involved in the process. However, bilateral or multilateral APAs may also be between tax havens or other countries facilitating tax avoidance, “in which case there is a risk that both countries are willing to sign an agreement facilitating tax avoidance.”

Luxembourg is among countries that have had one or more rulings questioned by the European Commission. Based on rulings in the LuxLeaks database, Professor Omri Marian went so far as to argue that Luxembourg made use of the tax rulings system to “manufacture” tax arbitrage opportunities for multinational companies.

APAs typically are confidential, and letter rulings may be, too. A tax administration may have the practice of keeping some or all of its rulings confidential, sharing them only with the taxpayer who is issued a particular ruling, and/or that taxpayer’s tax adviser. For example, until 2015, Luxembourg’s rulings process was confidential and uncodified. A witness from PwC reportedly testified at the LuxLeaks trial of Deltour, Halet, and Perrin that “[t]he documents concerned sensitive tax arrangements for big clients of the firm that are not even shared with clients …” LuxLeaks “opened the secret world of MNEs’ [(multinational entities’)] dealings with tax authorities to public scrutiny.”

---

72 Eurodad, Tax Games: The Race to the Bottom, Europe’s Role in Supporting An Unjust Tax System 24 (2017), https://eurodad.org/files/pdf/1546849-tax-games-the-race-to-the-bottom.pdf. “Conduit-OFCs . . . are ‘countries that are widely perceived as attractive intermediate destinations in the routing of investments’. Conduit-OFCs typically have low or zero taxes imposed on the transfer of capital to other countries, either via interest payments, royalties, dividends or profit repatriation. In addition, such jurisdictions have highly developed legal systems that are able to cater to the needs of multinational corporations.” Garcia-Bernardo, supra note 33, at 2 (quoting International Monetary Fund, Spillovers In International Corporate Taxation 18 n.35 (2014), https://www.imf.org/external/np/pp/eng/2014/050914.pdf). “Sink-OFCs are countries that attract and retain foreign capital—territories in this category are usually characterized as tax havens, such as the British Virgin Islands, the Cayman Islands and Bermuda.” Id.
73 Christians, supra note 63, at 1124 (“Luxembourg is but one player among many. The European Commission has charged Luxembourg, Ireland, and the Netherlands (so far) with using private deals to deliver improper state aid to favored companies.”). The European concept of “State aid” is discussed infra in text accompanying notes 135-148.
74 Marian, supra note 67, at 283 (“Luxembourg helped taxpayers by synthetically creating arbitrage opportunities when the laws of the source and residence jurisdictions were harmonized enough to prevent tax arbitrage.”).
75 See I.R.C. § 6103(b)(2)(C) (U.S. confidentiality statute); Hickman, supra note 36, at 180 n.55 (discussing confidentiality rules in Japan, Canada, Ireland, France, as well as OECD guidelines); Eden & Byrnes, supra note 52, at 23 (“APAs are negotiated behind closed doors and not made public”).
Rulings may be opaque even to other parts of that country’s government.⁸⁰ Rulings opacity raises rule-of-law issues,⁸¹ as well as the concern that they may contain aspects that would be objectionable to the public or to other countries if known.⁸² For example, Professor Allison Christians has argued that “advance pricing agreements and negotiated dispute settlements produce administratively determined outcomes that take place in the shadow of the law. This is a place to hide deals that might breach the public’s trust in the tax system, if broadly exposed.”⁸³

B. The Differing Transparency of U.S. Letter Rulings and APAs

In the United States, the transparency of both federal letter rulings and APAs is addressed by statute. However, the applicable statutes were enacted at different times and have opposite rules for letter rulings and APAs, as described in this Section.

1. Letter Rulings

In the United States, “[a] letter ruling is a written statement issued to a taxpayer by an Associate Chief Counsel Office of the Office of Chief Counsel or by the Tax Exempt and Government Entities Division that interprets and applies the tax laws to a specific set of facts.”⁸⁴ Such rulings are often referred to as “private letter rulings.” (PLRs).⁸⁵ The IRS “announced the

---

⁷⁹ Marian, supra note 67, at 281.
⁸⁰ For example, a U.S. Senate Report complained, “since June 1, 1925, the commissioner has refused to give this committee copies of unpublished rulings ….” S. Rep. No. 69-27, at 233 (1926). In the UK, Stephen Daly has argued “that there is inadequate examination of the correctness, clarity, and accessibility of HMRC advice.” DALY, supra note 23, at 85. Cf. Marian, supra note 67, at 282 (“In a September 17, 2015, hearing, members of the European Parliament grilled [Jean-Claude] Juncker [Luxembourg’s former Minister of Finance] on his alleged role in Luxembourg’s tax practices . . . . Juncker forcefully denied any involvement in or knowledge of the practices exposed in LuxLeaks.”).
⁸¹ See infra note 234 and accompanying text.
⁸² Christians, supra note 63, at 1123 (“Preserving trust generally requires that all taxpayers be subject to the same set of rules, while confidentiality leaves room for differential treatment that won’t be seen—and possibly protested—by the public.”); Ellis, supra note 31, at 35-36 (footnote omitted) (if rulings are issued selectively and not made public, “their use will not be acceptable to OECD and EC [(European Community)] member countries.”).
⁸³ Christians, supra note 63, at 1124.
⁸⁵ See supra note 25.
existence of the letter rulings program” in 1953, but, until the 1970s, PLRs were not routinely made publically available. During that period, only a small percentage were published.

The IRS was reluctant to make private rulings public in part because they are “a form of communication that was addressed to an individual taxpayer and concerned one particular transaction. By so doing, the [Internal Revenue] Service limited the scope of the ruling and, accordingly, limited its risk. Responsibility for issuing rulings in such cases could be delegated to lesser officials.” However, this lack of transparency of rulings created problems for taxpayer representatives and the government and was subject to criticism.

As a result of litigation, the law changed in the mid-1970s:

[In 1974 and 1975, the Service lost two cases in which the disclosure of private letter rulings was sought under FOIA [(the Freedom of Information Act)]. The Courts of Appeals for the District of Columbia Circuit in Tax Analysts and Advocates v. I.R.S. and for the Sixth Circuit in Freuhauf Corporation v. I.R.S concluded that private letter rulings were not “returns” exempt from disclosure under an exception to FOIA…. So began a journey toward the sunshine, which appeared to be completed with the enactment of section 6110 by the Tax Reform Act of 1976.

Code section 6110 states in part: “Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.” It also provides for redaction of identifying details, among other things, and it provides that letter rulings have no precedential value. With respect to precedential value, the Joint Committee Explanation of the 1976 Act states:

---

86 Rogovin & Korb, supra note 84, at 342.
87 Portney, supra note 27, at 753 (“Things stayed pretty much unchanged until the mid-1970s, despite the appearance of the Freedom of Information Act (‘FOIA’) on July 4, 1967. Private ruling letters remained private . . . .”).
88 Thomas R. Reid III, Public Access to Internal Revenue Service Rulings, 41 GEO. WASH. L. REV. 23, 25 (1972) (“Although the number of rulings issued publicly has increased considerably since 1952, the absolute number of published rulings is still de minimis: in each of the past five years, fewer than three percent of all tax rulings were made public.”) (footnote omitted).
89 Rogovin & Korb, supra note 84, at 346.
90 See infra text accompanying notes 243-245.
91 See infra text accompanying notes 184-192.
92 See Reid, supra note 88, at 25 (“In Congress, among scholars, and in the private tax bar it has been suggested that the ruling system is unfair and inimical to the public interest.”) (citations omitted).
93 Portney, supra note 27, at 753.
94 I.R.C. § 6110(a).
95 I.R.C. § 6110(c)(1).
96 I.R.C. § 6110(k)(3).
If all publicly disclosed written determinations were to have precedential value, the IRS would be required to subject them to considerably greater review than is provided under present procedures. The Congress believes that the resulting delays in the issuance of determinations would mean that many taxpayers could not obtain timely guidance from the IRS and the rulings program would suffer accordingly. Consequently, the Act codifies the prior administrative rules by providing that determinations which are required to be made open to public inspection are not to be used as precedent.  

Thus, under current U.S. law, although IRS letter rulings may not be relied on by taxpayers other than the one to whom a ruling is issued, they are publicly available in redacted form. Professor Diane Ring has argued that is consistent with a pattern of significant disclosure of ex ante taxpayer interactions with the IRS—those before the transaction has occurred.

2. APAs

“The IRS instituted a formal APA program in 1991.” It was adopted to try to address enforcement difficulties with respect to transfer pricing. The process typically involves conferences, submission of documents, and payment of a user fee. APAs are similar to letter rulings, though APAs focus on transfer pricing and have a greater focus on the facts. Professor Ring has argued that “APAs are forward-looking arrangements” and, like letter rulings, should be disclosed. Yet, APAs have been non-public documents since the program’s inception. In the 1991 Revenue Procedure announcing the APA program, the IRS declared that “[t]he information received or generated by the Service during the APA process relates directly to the

---

98 State tax authorities can also issue letter rulings. See Cara Griffith et al., Transparency in State Taxation, Part 2: Legislative Process and Letter Rulings, 64 S. TAX NOTES 331, 333 (2012) (hereinafter, Griffith et al. Part 2) (“Approximately 45 states and the District of Columbia offer private letter rulings, and of those about 35 make them available for the public, typically by publishing a redacted version on the department of revenue’s website.”). In general, U.S. states are less transparent with respect to the tax law than the federal government is. See Cara Griffith et al., Transparency in State Taxation – Part I: Discretionary Authority, 64 S. TAX NOTES, 189, 189 (2012) (hereinafter, Griffith et al. Part I) (“[T]he need for openness does not end with federal tax law. State taxing authorities should be held to the same standards. Transparency is vital to a dynamic debate on tax issues.”).  
99 Ring, supra note 41, at 207-08 (also arguing that ex post actions, from the filing of the tax return through potential settlement of litigation, generally are kept confidential).  
100 Borkowski, supra note 32, at 28.  
101 See Hickman, supra note 36, at 177.  
102 Hickman, supra note 36, at 178.  
103 See supra text accompanying notes 63-64.  
104 Ring, supra note 41, at 209. Cf. id. at 171 (stating that the APA procedure is “in critical ways, a hybrid of pieces of the system that existed—some occurring ex ante and others ex post.”). “Ex ante” refers to prior to the transaction. Id. at 214.  
105 See Hickman, supra note 101, at 174.
potential tax liability of the taxpayer under the Internal Revenue Code. Therefore, the APA and such information are subject to the confidentiality requirements of section 6103 of the Code.”

The IRS’s view did not go unquestioned. In 1996, “[a]s private libraries of APAs started developing in the major public accounting and law firms,” the publisher BNA filed suit to release APAs under Code section 6110 or FOIA. In January 1999, before the court issued a decision, “the IRS conceded that APAs are ‘rulings’ and therefore are ‘written determinations’ for purposes of section 6110” and thus subject to release.

In response to this IRS concession, some companies approached Congress expressing concern about the planned publication of redacted APAs. Congress quickly amended Code section 6103 to provide that “any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement” constitute protected “return information.” Information protected by Code section 6103 is an exception to FOIA. As a result, U.S. APAs are not publicly available. In fact, in contrast with FOIA, where “if a document contains confidential taxpayer information, other information that can be reasonably segregated from the sensitive portion of the document must be disclosed[,] [u]nder the 1999 change, the IRS can no longer disclose APAs no matter how much legal analysis and nonsensitive information the APA might contain.”

As a compromise, the 1999 legislation required the IRS to issue an annual report on APAs. “However, the APA annual report does not discuss specific APAs.” Moreover, the

---

108 STAFF OF JT. COMM. ON TAXATION, 106TH CONG., GEN. EXPLANATION OF TAX LEGISLATION ENACTED IN THE 106TH CONG. 34 (Comm. Print 2001), http://www.jct.gov/s-2-01.pdf (“Although the court had not issued a ruling in the case, the IRS announced its plan to publicly release both existing and future APAs.”).
109 Id. at 34; Kaye, supra note 107, at 1194.
111 See I.R.C. § 6103(a) (stating that “[r]eturns and return information shall be confidential”).
112 See 5 U.S.C. § 552(b)(3) (“This section does not apply to matters that are . . . specifically exempted from disclosure by statute (other than section 552b of this title), if that statute” meets certain requirements); Kaye, supra note 107, at 1194. Violations of section 6103 can be privately enforced in a civil suit for damages. See I.R.C. § 7431.
113 See Kaye, supra note 107, at 1195.
reports only “provide[] disassembled statistical data”117 that has been analogized to an unhelpful “auto manufacturer’s catalogue, providing no pictures or descriptions of the various models sold, but rather enumerating the aggregate number of carburetors, pistons, axles, bolts, body panels, and other parts used during the year ….”118 Thus, U.S. APAs remain quite nontransparent.

II. A TYPOLOGY OF RISKS OF NONTRANSPARENT TAX RULINGS

Although a letter ruling or APA can only be relied on by the taxpayer to whom it is issued, rulings issued to others nonetheless provide valuable information for similarly situated taxpayers. 119 For example, with respect to APAs:

In some industries, many agreements have been completed. The substance of these APAs could establish key categories of facts and data, agreed approaches to interpreting them, and acceptable methodologies for assigning arm’s-length returns to functions such as manufacturing and distribution in these and other industries. That information could in principle provide a real-world framework for discussing and perhaps resolving difficult cases.120

Nontransparent rulings—those that are shared by the tax administration only with the taxpayer and/or tax adviser receiving the ruling—eliminate this benefit.

Nontransparent rulings also give rise to several risks, which is perhaps ironic, given that rulings are generally used to reduce risks.121 LuxLeaks and other revelations help provide insights into some of the underlying risks. This Section organizes the risks into categories according to who bears these risks. This original typology identifies important risks that opaque rulings pose to countries, taxpayers, and tax advisers.

A. Risks to Countries

Opaque tax rulings create at least five risks to countries. Risks to countries other than the country issuing the ruling may be most salient—and are discussed first—but three of the five risks are borne by the country providing nontransparent rulings.122 Each of the risks is discussed below.

117 Stark et al., supra note 45, at 1069.
118 Id. at 1061.
119 See Stark et al., supra note 45, at 1068 (“Given the frequency with which particular issues are dealt with in the APA program, it must be the case that substantial information concerning the way that the IRS applies law to facts exists and could be disclosed, and that this information would greatly advance an effort to better define transfer pricing outcomes consistently with the way the IRS exercises its statutory discretion.”). One example would be where taxpayers are in substantially similar situations. See infra notes 217-227 and accompanying text (discussing situations involving similarly situated competitors).
120 Stark et al., supra note 45, at 1050.
121 See supra text accompanying notes 29-31.
122 For E.U. countries, the transparency of a country’s rulings could also affect the risk that a ruling is investigated by the European Commission as possible State aid. See Eden & Byrnes, supra note
1. Loss of Tax Base

The November 2014 revelations of LuxLeaks cast a spotlight on the content and volume of Luxembourg’s rulings practice, which, at the time, was uncodified. Instead, “the Luxembourg tax rulings practice was governed by general principles of law such as the principle of good faith and legitimate trust (principe de bonne foi et de confiance légitime),” which meant that it was an informal procedure. The process was also confidential and free of charge, which contrasts with the fee Luxembourg imposed, starting in 2015, of up to 10,000 Euros.

One concern a tax rulings regime, particularly a nontransparent one, poses for other countries is the negative externality of loss of tax base. For example, Omri Marian has explained:

[I]f the source and residence jurisdictions each define corporate tax residency the same way, a corporation can theoretically only be a tax resident in one jurisdiction or the other and can only claim interest deduction once. However, what if a third jurisdiction—which is neither the source jurisdiction nor the residence jurisdiction—inserts itself as an intermediary
between these two jurisdictions? Such intermediary jurisdiction could issue regulatory instruments that make it seem as if there exist differences between the tax laws of the source and residence jurisdictions.\textsuperscript{128}

In the example he uses, a Country A corporate investor making an investment in a corporation located in Country B could use either debt or equity and would have been taxed in one of those two countries because they have similar tax laws, seemingly leaving no room for tax arbitrage.\textsuperscript{129} However, with the cooperation of a third country (Country C) that issues a favorable tax ruling regarding the tax treatment of payments made to and from a shell corporation incorporated there and inserted in the middle of the transaction, “[i]n the simplest terms possible, the ATA [Advance Tax Agreement] took a deductible interest payment from Country B and forwarded it to Country A as a non-includible dividend.”\textsuperscript{130} Thus, neither Country A nor Country B collect tax on the transaction because of Country C’s ruling.

In such a scenario, both Country A and Country B suffer because of Country C’s tax ruling.\textsuperscript{131} The taxpayer benefits by paying less tax, and Country C benefits by getting a small percentage of the taxpayer’s tax savings (denominated as tax on the shell corporation).\textsuperscript{132}

2. Distortion of Competition

Loss of tax base is not the only possible cross-border effect. “EU Member States [have] argued that secret tax rulings are harmful, as they not only erode national tax bases of other EU States, but also can lead to artificial capital flows and movements of taxpayers and thus harm the proper functioning of the European internal market.”\textsuperscript{133} One commentator argued that secret rulings “distort competition and put in [an] unfavourable situation less mobile businesses.”\textsuperscript{134}

The European Commission has investigated certain tax rulings and found that they provided prohibited State aid,\textsuperscript{135} which, in a nutshell, is the provision of a selective private

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{128} Marian, supra note 2, at 23-24.
\item \textsuperscript{129} Id. at 24-25.
\item \textsuperscript{130} Id. at 24.
\item \textsuperscript{131} Developing countries are among the countries that suffer due to profit shifting. See Comment, Chi Tran, \textit{International Transfer Pricing and the Elusive Arm's Length Standard: A Proposal for Disclosure of Advance Pricing Agreements as a Tool for Taxpayer Equity}, 25 Sw. J. Int'l L. 207 (2019) (“A 2009 Christian Aid report substantiated the [Senate Permanent Investigations] Subcommittee’s finding, estimating that less developed countries lose approximately $160 billion in tax revenue each year due to profit shifting and multinational corporation tax avoidance schemes.”).
\item \textsuperscript{132} See Marian, supra note 2, at 26 (referring to Luxembourg); see also supra notes 69-70 and accompanying text.
\item \textsuperscript{133} Alicja Brodzka, \textit{Better Governance Through More Transparency on Advance Cross-Border Tax Rulings}, J. GOVERNANCE & REG., Mar. 29, 2017, at 7, 8.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} In 2014, the European Commission asked all “Member States …to confirm whether they provide tax rulings, and, if they do, to request a list of all companies that have received a tax ruling from 2010 to 2013.” European Commission, \textit{State Aid: Commission Extends Information Enquiry On Tax Rulings Practice To All Member States} (Dec. 17, 2014), https://ec.europa.eu/commission/presscorner/
\end{itemize}
\end{footnotesize}
advantage that affects trade within the European Union.\textsuperscript{136} Tax rulings are permissible in the European Union but “[t]he grant of a tax ruling must . . . respect the State aid rules.”\textsuperscript{137} State aid is not a tax doctrine; reduced taxation (furnished in any of a number of ways\textsuperscript{138}) is just one possible tool for providing a prohibited selective advantage.\textsuperscript{139}

While previously, the European Commission investigated entire rulings regimes, its more recent State aid cases focused on rulings granted to individual companies.\textsuperscript{140} As the Commission’s actions reflect, a ruling or “APA can move over from the tax realm (where . . . the APA is viewed as a beneficial policy that reduces . . . tax disputes) and into the—at least


\textsuperscript{136} State aid is prohibited by Article 107 of the Treaty on the Functioning of the European Union, which provides:

\begin{quote}
Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
\end{quote}

\textit{Treaty Provisions on State Aid}, http://ec.europa.eu/competition/state_aid/overview/index_en.html (emphasis added). \textit{See also} \textit{id.} (“State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.”).


\textsuperscript{138} \textit{See} Stephen Daly, \textit{The Power To Get It Wrong}, 137 L.Q. REV. . . . . (forthcoming 2021) (on file with the author) (listing as possibilities (1) the content of substantive tax rules, (2) discretionary application of the tax laws, and (3) “administration of the tax rules”).

\textsuperscript{139} \textit{Id.} Professor Ruth Mason has argued that “the state-aid rules, at least in part, are designed to promote competitive neutrality, and they are not properly interpreted to eliminate interstate tax (or other regulatory) competition, except incidentally to promote competitive neutrality.” Mason, supra note 65, at 493.

perceived—realm of competition policy ….”  

Although the existence of a ruling issued to a particular taxpayer does not necessarily show a selective advantage,  

it shows the presence of a government intervention authorizing a particular tax treatment to that taxpayer.

The European Commission’s use of the State aid doctrine to tackle tax rulings is controversial. One article framed it that in the sluggish economy following the Great Recession, the European Commission (EC) turned to the use of “state aid control (for which the EC has exclusive competence).”  

Although the Commission has brought only a handful of such cases in recent years, its treatment of some tax rulings as State aid may deter the issuance of rulings, especially now that ruling summaries are exchanged with other countries. In

---

141 Eden & Byrnes, supra note 52, at 11. Cf. Mason, supra note 140, at 452 (“Originally designed to prevent protectionism, over time the scope of the state aid prohibition has expanded, and now, it embraces a stance against harmful tax competition.”).

142 See Richard Lyal, Transfer Pricing Rules And State Aid, 38 FORDHAM INT’L L.J. 1017, 1040 (2015) (“[T]he mere existence of an advance tax ruling, of a system for granting tax rulings, or of legislation that enforces tax rulings, is entirely neutral from a State aid perspective. The function of a tax ruling is in principle to apply the general rules to a particular case, but doing so in advance rather than after the fact and for a more or less prolonged period rather than a single tax year.”).

143 See, e.g., James Anderson et al., UK Plans to Maintain State Aid Regime Post-Brexit, SKADDEN (Aug. 30, 2018), https://www.skadden.com/insights/publications/2018/08/uk-plans-to-maintain-state-aid-regime-post-brexit (referring to “the EC’s highly controversial application of the state aid rules to tackle tax rulings and fiscal incentive schemes.”); Kyle Richard, Are All Tax Rulings State Aid? Examining the European Commission’s Recent State Aid Decisions, 18 HOUS. BUS. & TAX L.J. 1, 6 (2018) (“The Commission’s Decisions have been harshly criticized by multinational firms and regulators, but appear to reflect prior criticism that non-governmental organizations (NGOs) had levied against both multinational enterprises and low-tax jurisdictions.”).

144 Nicholas J. DeNovio et al., State Aid: What It Is, and How It May Affect Multinationals and Tax Departments, 68 TAX EXEC. 15, 17 (Apr. 6, 2016).

145 See Steven D. Felgran & Mat Hughes, Transfer Pricing Meets State Aid: Conflicting Arm’s-Length Standards and Other Lessons From the Apple Saga, 88 TAX NOTES INT’L 959, 963 (2017) (listing seven State aid cases, involving rulings issued by Belgium, Ireland, Luxembourg, and the Netherlands.)

146 See Bernard Thomas, Retour au bureau d’imposition Sociétés 6, LÉTZEBUERGER LAND (Jun. 30, 2016), http://www.land.lu/page/article/120/333120/FRE/index.html (“on préfère éviter l’échange automatique des rulings ; tant par peur d’une fuite dans la presse . . . que par crainte d’une énième enquête de la Commission européenne pour aide d’État illégale.” meaning “we prefer to avoid the automatic exchange of rulings, as much out of fear of a leak in the press . . . as out of fear of yet another investigation by the European Commission for illegal state aid.”) (translation by the author). Cf. Adrien Giraud & Sylvain Petit, Tax Rulings and State Aid Qualification: Should Reality Matter, 2017 EUR. ST. AID L.Q. 233, 241 (2017) (“It is precisely because of the difficulty of this [transfer-pricing] exercise that companies need to be able to obtain a certain level of security from tax authorities through rulings. The intervention of the Commission, which second-guesses tax administrations, is not helpful in this respect.”) (footnote omitted); Anna Gunn & Joris Luts, Tax Rulings, APAs and State Aid: Legal Issues, 24 E.C. TAX REV. 119, 125 (2015) (“At the end of the day, taxpayers must be able to determine whether their tax rulings and APAs are compatible from the EU perspective. Well-functioning ruling practices should be encouraged and preserved, as it is essential for providing the legal certainty needed to stimulate economic investments.”).
addition, the United States has objected to the European Commission’s approach.\footnote{147} The United States has an interest because many of the companies involved are U.S. multinationals.\footnote{148}

3. Embarrassment Upon Revelation of Sweetheart Deals

A risk to a country issuing confidential rulings, as with any secret deal, is that government officials will be embarrassed if the secret is revealed.\footnote{149} In the tax rulings context, this has happened to several countries. There are several embarrassing incidents included in the Congressional record from the 1950s and 1960s, as discussed below.\footnote{150} U.S. officials may also have been embarrassed in the 2000s by reporting in Tax Notes on the alleged suppression of a Senate report on APAs.\footnote{151}

On the world stage, LuxLeaks is a prominent example, as it was international headline news.\footnote{152} However, there have been other embarrassing disclosures in the rulings context. For example, in 1999, a report known as “the Primarolo report identified the advance tax rulings system in the Netherlands as a harmful tax practice, because certain tax arrangements resulted in

\footnote{147} The Treasury Department argued in a white paper that the European Commission had made two changes in these cases:

[T]he Commission has collapsed the concepts of “advantage” and “selectivity,” which are distinct requirements under State aid law. . . .

Second, under the Commission’s new approach, an economic advantage provided to a multinational company, but not to a standalone one, would \textit{a fortiori} meet the selectivity requirement. As detailed below, however, prior EU cases and Commission decisions show that disparate treatment attributed solely to the difference between multinational companies and standalone companies has not necessarily resulted in a tax measure being deemed selective.


\footnote{148} U.S. Dept. of the Treas., \textit{The European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings} 3 (2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf (“the investigations appear ‘to be targeting U.S. companies disproportionately.’”) (quoting Letter from U.S. Senate Committee on Finance to Jacob J. Lew, U.S. Secretary of the Treasury (Jan. 15, 2016). If they pay more tax to other countries, they may receive a foreign tax credit, lowering their U.S. tax. \textit{Id}. A Treasury Department white paper expressed concern that this “would effectively constitute a transfer of revenue to the EU from the U.S. government and its taxpayers.” \textit{Id}. However, Dan Shaviro has pointed out that this may simply be a failure to gain revenue, rather than an actual loss to the U.S. fisc. Daniel Shaviro, \textit{Foreign Tax Credits to the Rescue?}, \textit{START MAKING SENSE} (Dec. 5, 2015), danshaviro.blogspot.com/2015/12/foreign-tax-credits-to-rescue.html.

\footnote{149} Unlike government officials, taxpayers do not appear to have reacted defensively after tax rulings were leaked.

\footnote{150} See infra text accompanying notes 184-190.

\footnote{151} See infra text accompanying notes 175-177.

\footnote{152} See supra note 1 and accompanying text.
artificial or non-standard arrangements.” The government reacted by making “the tax ruling system … more rigorous and requir[ing] greater economic[] substance ….”

In 2015, the 1999 report on tax rulings referred to as the Simmons & Simmons report was revealed on the Kluwer International Tax Blog. The Simmons & Simmons report allegedly had been suppressed by France because it disclosed France’s favorable deal with Disney. France likely was embarrassed by the disclosure.


Biz, supra note 28, at 1045.


Keijzer, supra note 156 (“The French Government had every reason to suppress the publication of the study and annex. Concluding a deal to attract investors going outside the legal framework enacted is wrong within France in 1999, wrong in the EU in 1999 and it would be a miracle were it to continue today.”).


Eric Maurice, Juncker produces missing page on tax rulings, EU OBSERVER (Sep. 30, 2015), https://euobserver.com/economic/130501. The page in question, which is in French, is available at https://s3.eu-central-1.amazonaws.com/euobs-media/495d0a51a0f6f76e9715d06031eff99d.pdf (hereinafter, Krecké Page). An English translation can be found online at https://translate.googleusercontent.com/translate_c?depth=1&hl=en&prev=search&rurl=translate.google.com&sl=de&sp=mnt4&u=http://www.fabio-de-masi.de/kontext/controllers/document.php/111.5/5/9b72a1.pdf&xid=25657,15700002,15700021,15700186,15700190,15700256,15700259&usg=ALkJrhhxnxPwjr5mJGHKuGBrQ8EK7eeSabQ.

Krecké was titled “Rapport Sur la Fraude Fiscale au Luxembourg” (Report on Tax Fraud in Luxembourg) and dealt with a variety of aspects of tax fraud. At least one page was not included in the published version of the report. There were three complete copies of the report, of which one reportedly was given to Mr. Juncker, who, in 1997, was Luxembourg’s Prime Minister and Minister of Finance.

The page Juncker released contains the section headed “tax ruling.” “Mr Krecké has said he did not release the page originally as he deemed it too sensitive for public disclosure[.]

My decision was based on the fact that I did not find it appropriate to launch an international discussion on tax rulings during our presidency [of the European Commission].”

The revelation in 2015 of the missing page likely was embarrassing to Mr. Juncker, who had been the subject of a failed “no confidence” vote by the European Parliament in November 2014.

161 Id. Krecké “was at the time vice-president of the Luxembourg Socialist Workers’ Party (LSWP).” Id.
163 European Parliament, Parliamentary Questions, Krecké Report, https://www.europarl.europa.eu/doceo/document/E-8-2015-009264_EN.html (stating that “several pages dealing with tax ruling practices were not published, as they were considered too sensitive for public exposure.”) (last visited July 20, 2020).
164 Véronique Poujol, Un rapport sur les rulings de 1997 en édition limitée, PAPERJAM (Nov. 12, 2014), http://services.paperjam.lu/news/un-rapport-sur-les-rulings-en-edition-limitee (“Le tirage de cette version non édulcorée du rapport sur la fraude fiscale serait limité, d’après nos informations, à trois exemplaires, dont un avait été remis à Jean-Claude Juncker”, meaning “The circulation of this unaltered version of the report on tax fraud would be limited, according to our information, to three copies, one of which had been given to Jean-Claude Juncker.”) (translation by the author).
165 Wikipedia, Jean-Claude Juncker, https://en.wikipedia.org/wiki/Jean-Claude_Juncker. Mr. Juncker was Luxembourg’s Minister of Finance from 1989 to 2009. Id. He was the Prime Minister of Luxembourg from 1995 to 2013. Id.
166 See Krecké Page, supra note 159. The section starts on that page and takes up about three-fourths of the page, so it does not appear to continue beyond that page. See id.
167 Matthew Holehouse, EU’s Juncker Releases Secret ‘Luxleaks’ Tax Advice, THE TELEGRAPH, Sept. 30, 2015. See also European Parliament, supra note 163 (“several pages dealing with tax ruling practices were not published, as they were considered too sensitive for public exposure. This has been confirmed internally by Jeannot Krecké and never officially denied by the Luxembourg Government.”); Juncker warned about Luxembourg tax deals in 1997, LUXEMBOURG TIMES (Oct. 2, 2015), https://luxtimes.lu/archives/9709-juncker-warned-about-luxembourg-tax-deals-in-1997 (“Krecké had deliberately removed the chapter on tax rulings from the official version published in 1997 in order not to offend then premier Juncker, as Luxembourg prepared at the time to assume the rotating presidency of the EU.”).
In part, the previously missing page expresses concern that companies not face a situation where a ruling is not honored by the tax administration after the fact, and it suggests that rulings should be given with “a maximum of guarantees.” In the absence of transparency, it is harder for a tax administration to credibly guarantee that it will stand by its ruling, which affects the legal certainty that rulings are supposed to provide to the requesting taxpayer. It is worth noting that Luxembourg recently stated that its rulings issued before January 1, 2015 have no effect.

4. Lack of Protection for a Weak Tax Administration

Another risk to countries of nontransparent rulings is the possibility that the fisc suffers for the benefit of private taxpayers. The specific risk is that the taxpayer may obtain an excessive tax benefit if the tax authority is weak and tax deals are opaque—even to other entities in that country’s government—and thus not monitored. Transparent rulings can help give a weak tax administration cover to demand concessions because of pressures it faces from other domestic stakeholders, such as the Treasury Department or Ministry of Finance.

This risk may have manifested itself in the United States with respect to APAs. In the early 2000s, “excerpts leaked to the press revealed that there were problems with the APA program, including assertions that the program was poorly managed and that the IRS was giving away the store by agreeing to terms highly favorable to big business.” In 2003, the U.S. Senate began investigating the APA program. The report was never released.

---

169 Krecké Page, supra note 159 (translation by the author). The report states in this respect: Dans la mesure où il est légitime pour le contribuable de connaître avec certitude les règles fiscales qui entourent ses activités, la pratique du ‘tax ruling’ n’est guère critiquable. Tout au plus conviendrait-il d’entourer ces ‘tax ruling’ d’un maximum de garanties, afin d’éviter que l’administration fiscale, après avoir induit le contribuable en erreur, en raison du fait qu’elle a fait une mauvaise analyse de la loi, ne puisse se déjuger en refusant d’appliquer le ‘tax ruling’ à un contribuable qui s’y est pourtant conformé, au motif de son illégalité.

170 See supra text accompanying note 53.


172 See supra note 80.

173 The author thanks Stephen Daly for this point. In effect, this would be a negotiating strategy employed because of the relative lack of power of the tax administration in the negotiation. See Jeffrey Z. Rubin & L. William Zartman, Asymmetrical Negotiations: Some Survey Results That May Surprise, 11 NEGOTIATION J. 349, 356 (1995) (“Weaker parties typically respond not by acting submissive, but by adopting appropriate countering strategies of their own…. Perhaps the major source of power—seen as means of controlling outcomes—[is] the ability to bring in support from external actors.”).

174 Nadal, supra note 48, at 366.

175 Id.

176 Id.
‘first, the report was informally lobbied into submission. Second, the Republican [Finance Committee], which initiated the inquiry, went from majority to minority. After that, the report died for all practical purposes.’”177

Lee Sheppard reported that “Senate investigators found IRS officials signing off on APAs in a hurry in their anxiousness to make a deal and show a good number of deals completed.”178 She also stated that “Senate investigators found that pushier taxpayers got better deals, and got transfer price breaks. Investigators found that the IRS knowingly allowed some taxpayers to set their transfer prices at a discount below comparable uncontrolled prices.”179 Sheppard further reported that “the nonpaying companies’ home countries go to bat for them. Those countries have learned that stonewalling American competent authorities usually results in a concession because American negotiators are terrified of double taxation, particularly when the taxpayer is an American company.”180

5. Corruption or the Appearance of Corruption

A related risk, potentially costly to the fisc, is that of corruption on the part of the tax administration. This generally relates to taxpayers obtaining rulings that they might otherwise not get, or more favorable rulings than they would otherwise receive.181 This can result from outright corrupt activity—such as bribes—or from relationships between particular taxpayers and members of the tax administration. Successful corruption requires secrecy.182 Conversely, secrecy increases the risk of corruption.183

The United States provides examples of at least perceived corruption, as it has experienced several situations of irregular behavior regarding tax rulings that are described in Congressional records. For example, in the 1950s, as part of a report to the House Ways and Means Committee on tax administration, Congressman Robert W. Kean reported on six cases in which top Treasury officials had intervened on behalf of the taxpayer. The Monsanto and Lasdon cases . . . illustrate the way in which Treasury officials brought influence to bear to produce questionable results favorable to the taxpayer.

---

177 Id. at 369.
179 Id. at 1632.
180 Id.
181 Corruption could also involve denial of a ruling request for illegitimate reasons, perhaps when other similarly situated taxpayers obtained rulings. Cf. OECD, Harmful Tax Competition: An emerging Global Issue 29 (1998), https://www.oecd.org/tax/harmful/1904176.pdf (“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.”). For a general discussion of the denial of a ruling to one of two competitors, see infra Part I.B.2.
in these cases. The revenue loss as the result of the decisions in these cases was in excess of $10 million.\textsuperscript{184}

The report observed that these officials were political appointees.\textsuperscript{185} The report also states that “it is indisputably clear that intervention in tax cases by Treasury officials for political or personal reasons not only produced improper decisions in tax cases, but also had an adverse effect on the entire internal revenue system.”\textsuperscript{186} Congressman Kean concluded on the rulings issue that “[c]areful study of the four Treasury interference cases involving rulings suggests that a policy of publication of all policy rulings might have deterred Treasury officials from intervention on behalf of the taxpayers.”\textsuperscript{187}

Letter rulings did not all become public immediately after Kean’s report, but the IRS did increase its publication efforts. In a 1954 article, one commentator remarked, “[o]ne of the most important developments in tax rulings is the program of the Internal Revenue Service for increased publication of rulings.”\textsuperscript{188} He further explained that “[t]his program resulted in part from criticism from Congressional sources that non-publication of rulings permitted favoritism and protected the use of ‘influence,’” along with criticism from practitioners.\textsuperscript{189}

IRS rulings continued to mostly be confidential in the 1960s. In 1965, Senator Gore explained to the U.S. Senate how Congress’ grant to the Du Pont company of a special tax-relief bill in connection with a divestiture “was marred by a last-minute change in a Treasury ruling. This change, negotiated and issued in secrecy, and contrary to the clear intent of Congress, resulted in a loss of revenue, by Treasury’s own admission, in the amount of some $56 million.”\textsuperscript{190} In introducing a bill that would require the publication of all tax rulings with a revenue effect of $100,000 or more,\textsuperscript{191} Senator Gore argued that:

The reasons given by former [Treasury] Secretary Dillon for changing the 1963 ruling are so flimsy, his reasoning so specious, his conduct so strange and at such variance with announced regular procedure, and the results such a blatant handout of public money to a very few people who do not need it, that I believe if he and other officials had known that this secret new ruling was to be made public immediately upon issuance, then that ruling would not have been made.\textsuperscript{192}

\textsuperscript{184} Report to the Committee on Ways and Means by the Subcommittee on Administration of the Internal Revenue Laws, 10 (1953). Four of the six cases involved rulings. See infra text accompanying note 187.
\textsuperscript{185} Report to the Committee on Ways and Means, supra 184, at 36 (“Corruption, of course, is possible at any level of Government, but political influence conceivably would be less strongly felt by career employees of the Bureau than by politically appointed Treasury officials.”).
\textsuperscript{186} Id. at 10.
\textsuperscript{187} Id. at 35.
\textsuperscript{188} Sugarman, supra note 29, at 37.
\textsuperscript{189} Id.
\textsuperscript{190} 111 Cong. Rec. 11811 (1965) (statement of Mr. Gore).
\textsuperscript{191} Id. at 11814 (statement of Mr. Gore).
\textsuperscript{192} Id. at 11811 (statement of Mr. Gore).
The United States is not alone in facing this type of issue. In Luxembourg, in the late 2000s, Paul Daubenfeld, an employee of the Luxembourg tax administration (the Administration de Contributions Directes), was accused of corruption relating to tax rulings.\textsuperscript{193} French businessman “Mr. Jumeaux is suspected of having paid fees to Paul Daubenfeld in exchange for his intervention in certain corporate tax files of his Luxembourg fiduciary.”\textsuperscript{194} Daubenfeld, in turn, accused other tax administrators of conducting private accounting practices after hours apparently with respect to companies they also handled on behalf of the tax administration.\textsuperscript{195}

\textsuperscript{193} Patrick Théry, \textit{Le fisc luxembourgeois sur le banc des accusés} (Nov. 22, 2009), http://www.lessentiel.lu/de/news/story/31593031 (“Le procédé s'appelle le ‘ruling’. Il consiste à prévenir les agents des contributions que l’on a fait un gros bénéfice et qu’on souhaite en envoyer 80% vers une société off-shore. Les 20% restants étant alors imposés au Luxembourg. Selon Paul Daubenfeld qui a dénoncé cette pratique, au moins sept autres fonctionnaires du fisc luxembourgeois sont concernés. . . . José Jumeaux et Paul Daubenfeld compareraient demain pour abus de confiance, corruption, immixion, concussion, faux et usage de faux et infraction à la loi luxembourgeoise sur les sociétés.” meaning “The procedure is called a ‘ruling’. It consists of alerting the tax officials that we have large profits and that we want to send 80% to an offshore company. The remaining 20% is then taxed in Luxembourg. According to Paul Daubenfeld, who denounced this practice, at least seven other Luxembourg tax officials are concerned. . . . [French businessman] José Jumeaux and Paul Daubenfeld will appear tomorrow for [various crimes].”

\textsuperscript{194} Marina Nickels, \textit{5 ans de prison requis au Luxembourg contre un homme d’affaires français}, \textit{TAGEBLATT}, http://www.tageblatt.lu/nachrichten/luxemburg/5-ans-de-prison-requis-au-luxembourg-contre-un-homme-d-affaires-francais-97535691/. Similarly, in Australia, “Nick Petroulias was a former Assistant Tax Commissioner who used his position in the tax office to secure rulings for companies in which he had a financial interest.” DALY, \textit{supra} note 23, at 157; see Petroulias v R [2014] NSWCCA 108.

\textsuperscript{195} Théry, \textit{supra} note 193 (“Selon Paul Daubenfeld . . . au moins sept autres fonctionnaires du fisc luxembourgeois sont concernés. D’après lui, ils avaient créé leur propre société de comptabilité.” meaning “According to Paul Daubenfeld, . . . at least seven other Luxembourg tax officials are involved. According to him, they had created their own accounting company.”) (translation by the author). It appears that the colleagues who Daubenfeld accused were not indicted. Patrick Théry, \textit{“Le ruling n’est ni illégal, ni exceptionnel chez nous”}, L’\textit{ESSENTIEL} (Nov. 23, 2009), http://www.lessentiel.lu/fr/luxembourg/story/le-ruling-n-est-ni-illegal-ni-exceptionnel-chez-nous-24265018 (“Depuis trois ans, il n’y a eu que lui d’inculpé. Il y a bien eu une perquisition chez un autre fonctionnaire, sans suite’, ajoute Guy Heintz.”) (“In the last three years, only he was charged. There was in fact a search warrant executed on another official, without further action,’ adds Guy Heintz [Director of the ACD].”) (translation by the author).

\textsuperscript{196} Patrick Théry, \textit{Le procès du siècle n’aura pas lieu}, \textit{INTIMECONVICTION} (No. 29, 2009) (“la seconde enquête concernant les pratiques de certains fonctionnaires des contributions qui faisaient aussi la comptabilité de sociétés dont ils traitaient les dossiers a peu de chances d’aboutir.” meaning “the second investigation into the practices of certain civil servants who also did accounting work for the companies whose files they dealt with is unlikely to succeed.”) (translation by the author).

This type of issue is not unique to Luxembourg. In the United States, a recent report by the Treasury Inspector General for Tax Administration “identified 167 employees who potentially engaged in prohibited activities such as tax preparation, and 2,196 employees who hold positions that, depending on the nature of the outside employment activity, have a higher risk for a real or perceived conflict of interest.” TIGTA, \textit{Processes Do Not Adequately Reduce the Risk That Outside Employment Activities Will Conflict With Employees’ Official Duties} (Sept. 25, 2019) (Highlights page).
Even in the absence of confirmed corruption, secrecy may lead to rumors of impropriety. For example, as with letter rulings, “[b]ecause advance pricing agreements are not published, the IRS has been accused of cutting secret ‘deals’ with individual taxpayers that are not subject to any legal standard or review.”\(^{197}\)

An additional concern is recruitment by the private sector of tax officials with insider knowledge. This happened in the United States with the respect to the IRS’s predecessor, the Bureau of Internal Revenue (BIR):

Rulings were known only to insiders, including affected taxpayers, their representatives, and relevant BIR employees. As the committee report observed, “This system has created … a special class of tax practitioners, whose sole stock in trade is a knowledge of the secret methods and practices of the Income Tax Unit.” Knowledge of secret precedents had made Bureau employees extremely valuable to corporate taxpayers, fostering a damaging rate of turnover.\(^{198}\)

Similarly, in the present day, “firms that employ … former insiders and specialists tout their specialized expertise and insider knowledge of the APA program and draw on their knowledge of the IRS and its past agreements in advising and advocating for clients.”\(^{199}\) The 2004 U.S. Senate review of APAs may have been prompted in part by “an appearance of impropriety associated with Washington’s ‘revolving door.’”\(^{200}\)

Corruption or even the appearance of corruption can foster distrust of the tax administration,\(^ {201}\) undermining its legitimacy.\(^ {202}\) Moreover, the agency may not legally be allowed to defend its actions by revealing taxpayer information.\(^ {203}\) In the 1950s, a U.S. Congressional report stated that “the Bureau [of Internal Revenue] should make public as many as possible of its administrative decisions. Their availability to public scrutiny should serve as a deterrent to favoritism and enable the public to satisfy itself as to the impartiality of tax administration.”\(^ {204}\) In the 1970s, after the Du Pont incident discussed above,\(^ {205}\) one commentator argued that “[f]ull disclosure of letter rulings would assure that neither incompetence … nor

\(^{197}\) Hickman, supra note 36, at 190.


\(^{199}\) Stark et al., supra note 45, at 1070.

\(^{200}\) Kevin A. Bell, ‘Variety of Concerns’ Driving Senate Review of APAs, 102 TAX NOTES 333, 333 (2004).

\(^{201}\) Blank, supra note 25, at 456 (“[G]iven the enormous financial stakes involved, often billions of dollars in potential tax liability, and the IRS’s ex ante bargaining position, advance tax rulings pose unique threats to the integrity of the IRS, whether perceived or actual.”) (footnote omitted).

\(^{202}\) Id. at 488 (“Non-disclosure of ex ante tax administration … threatens the sociological legitimacy of the IRS by causing the public to question the agency’s integrity.”).

\(^{203}\) Id. at 517 (“Despite the intimation [in a news story regarding APAs] of collusion between the IRS and taxpayers, the IRS is prohibited from addressing the accusations publicly as a result of general tax privacy rules.”)

\(^{204}\) Report to the Committee on Ways and Means by the Subcommittee on Administration of the Internal Revenue Laws, 30 (1952) (emphasis added).

\(^{205}\) See supra text accompanying notes 190-192.
deliberate favoritism is being concealed, and would promote indispensable confidence in the rulings process and the tax system in general.”206 Today, a statement in the IRS’s Internal Revenue Manual similarly reflects a concern for perceived impartiality:

The assignment of letter rulings must comply with the policy provided for in this section. It is important that the public is confident that the letter ruling program is administered fairly and impartially. The policy is intended to foreclose the risk and the potential perception that practitioners can unduly influence the process for assigning a case to a specific counsel attorney.207

B. Risks to Taxpayers

1. Barriers to Access

Taxpayers also face risks from nontransparent tax rulings. One risk relates to who is able to access the rulings process and past rulings. When letter rulings and/or APAs are transparent, existing rulings provide reference material that some taxpayers may not be able to afford to get otherwise.208

In addition, in the absence of published rulings, some taxpayers may not know about the availability of tax rulings or how to obtain one.209 In that case, only taxpayers who can afford a knowledgeable tax adviser may be able to access the rulings process.210 For example, the U.S.

__________________________

207 I.R.M. ¶ 32.3.2.3.1 (07-09-2014) (emphasis added). This policy appears to respond to a 2013 Treasury Inspector General for Tax Administration report. Treasury Inspector Gen. for Tax Admin., Chief Counsel Should Take Steps to Minimize the Risk of Outside Influence on Its Letter Rulings (Aug. 29, 2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310081fr.html (“Chief Counsel does not have written policies and a management information system with complete and accurate information to assess the potential that tax practitioners or taxpayers have influenced the letter ruling process to obtain more expeditious and favorable letter rulings.”).
208 See Tran, supra note 131, at 223 (arguing in the APA context that “disclosure would level the playing field for smaller multinationals that lack the resources to execute an APA themselves. Just as not every company can afford to conduct a costly transfer pricing study, not every multinational can afford to enter into an APA with the IRS and/or other taxing authorities.”).
209 See OECD, supra note 181, at 44-45 (“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 taxpayers since the lack of public information on this regime may put taxpayers in different positions when determining their tax situation.”); see also Jennifer Carr, Transparency? Informal and Invisible Guidance in Kentucky, 65 ST. TAX NOTES 303, 304 (2012) (in Kentucky during the period that rulings were confidential, one lawyer commented that “someone who practices tax only occasionally may not even know what to do, given the DOR’s unadvertised and informal approach to providing written guidance.”).
210 See id. (“[T]he [Kentucky] DOR’s failure to publish its written guidance greatly benefits large tax practices, which can accumulate and rely on legal guidance that is unavailable to smaller firms or individual taxpayers.”); cf Adrian A. Kragen, The Private Ruling—An Anomaly of Our Internal Revenue
state of Kentucky has experienced access barriers resulting from the need to have insider knowledge of its Department of Revenue (DOR):

Mark F. Sommer, chair of the tax and finance practice group at Bingham Greenebaum Doll LLP, described a “free-form” and “ad hoc” process by which taxpayer representatives approach DOR staff who they know in order to receive written or verbal guidance about a tax matter…..

That process may seem refreshingly unbureaucratic, but it can have drawbacks. Describing the practice for receiving written guidance as “very informal,” [another lawyer] added that the DOR can be a “closed shop unless you know all the players.”

After LuxLeaks, Luxembourg addressed an apparent perception that there was unequal access to the rulings process. The Luxembourg Ministry of Finance stated in December 2014, “[i]t has to be emphasized that any taxpayer has the possibility to address himself to his tax office, including, as the case may be, to ‘Bureau d’Imposition Sociétés 6’, and this on an equal basis. Thus, it would be false to state that a privileged access or treatment has been specifically reserved or granted to the Big Four accountancy firms, or any other entity.”

2. Inconsistent Tax Treatment

If letter rulings are not observable, some taxpayers may obtain concessions that others do not, raising issues of horizontal equity. Different treatment may be due to individual agents’ decisions on rulings, or it may simply be that some taxpayers do not know that it is possible to obtain a favorable ruling on an issue for which a competitor has favorable treatment. A 1972 System, 45 TAXES 331, 340 (1967) (stating that under the then-existing system, “the IRS . . . give[s] taxpayers, in effect, special consideration merely because they are sophisticated enough, or have counsel sophisticated enough, or have enough tax dollars at stake, to warrant the request for a private ruling.”).

Carr, supra note 209, at 304. Kentucky subsequently lost a lawsuit and began disclosing its rulings. See infra notes 338-339 and accompanying text.

On the perception of unequal access, see Mischo & Kerger, supra note 77 (“For private individuals and taxpayers not affiliated with this tax office [Sociétés 6], it may have been more difficult to obtain a tax ruling. This raised issues regarding the principle of equality before the tax law, which is entrenched in the Luxembourg constitution under article 101.”).


See DALY, supra note 23, at 60; see also Blank, supra note 25, at 456 (“taxpayers have an interest in determining whether the IRS is issuing advance tax rulings on equitable terms to like-situated taxpayers.”); Ring, supra note 41, at 195 (“[I]f the conclusions reached in APA negotiations with taxpayer A are not disclosed or are disclosed in a fairly limited form, then taxpayer B who does not seek an APA may receive different treatment than taxpayer A through the process of audit, appeal and litigation.”).

See id. at 60 (individual revenue agents may “make de facto changes to the law to fit their personal morality”), 73 (referring to “internal policies that affect classes of taxpayers but these policies
article describing the situation in the United States during the period that letter rulings were not generally published stated that “[a]mong the tax practitioners contacted, virtually all knew of circumstances in which taxpayers gained an advantage by obtaining a private ruling or learning of one of which competitors were unaware.”

Even where two competitors both apply for similar rulings, they may not obtain the same result. This has happened in the United States. One example involves Glaxo’s unsuccessful request for an APA in a context in which a similarly situated competitor, SmithKline Beecham, had obtained one.

Another such instance was during the era that private letter rulings generally were not published, as described in International Business Machines Corp. v. United States. In that case, the taxpayer, IBM, had one main competitor from 1951 to 1958, Remington Rand. “Before mid-April 1955, both companies paid on these articles the ten percent excise tax . . . for the sale or lease of ‘business machines’. However, in 1955, Remington Rand obtained a private ruling stating that the tax did not apply to its machines. IBM learned about the existence of its competitor’s ruling “through its customers.” IBM urgently requested an identical ruling. Because IBM did not receive a favorable ruling and ultimately paid excise tax during periods that its competitor did not, IBM sued to try to obtain comparable tax treatment.

IBM won in court under a statute addressing retroactivity in IRS rulings, but the substantive outcome is less important than the illustration that, when tax rulings are not

---

216 See Reid, supra note 88, at 25 n.15.
217 See Report to the Committee on Ways and Means, supra note 184, at 35 (“[P]ublication of the Monsanto ruling would have caused embarrassing protests by the Public Service Co. of New Hampshire, to which a ruling had been denied on like facts.”). Cf. Christopher M. Pietruszkiewicz, Does The Internal Revenue Service Have A Duty To Treat Similarly Situated Taxpayers Similarly?, 74 CINN. L. REV. 531, 532-33 (2005) (describing the GlaxoSmithKline APA situation).
218 See Pietruszkiewicz, supra note 217, at 532-33 (“GlaxoSmithKline contends that the IRS granted a favorable APA to … former competitor SmithKline Beecham Plc for its ulcer drug, Tagamet, in 1993, and that its 1994 request for a similar APA for its ulcer drug, Zantac, was not acted upon by the IRS even though the Zantac product was similar to Tagamet.”); Stark et al., supra note 45, at 1066 (“[T]he basic facts concerning discovery, development, and promotion [of the drugs] were similar…. The economist who provided the transfer pricing study accompanying the SB Corp. APA application also prepared the study for an APA requested for Zantac and regarded the two cases as closely comparable.”).
219 See supra text accompanying notes 87-96.
220 International Business Machines Corp. v. United States, 343 F.2d 914, 915-16 (Ct. Cl. 1965).
221 Id. at 916.
222 Id. The “private ruling [was] in the form of a short telegram . . . .” Id.
223 Id.
224 Id.
225 Id. at 917 (“Plaintiff was thus held liable for the excise tax for the full period from June 1951 through January 1958—roughly the same period for which Remington had been relieved of the tax.”).
226 Id. at 921 (“We must thus decide whether the Commissioner of Internal Revenue abused his discretion, under Section 7805(b), when he insisted that, as to this taxpayer, his ruling of November 1957
published, inconsistent treatment may be both more likely to occur and harder to detect. In the IBM case, the unusual fact that the taxpayer, IBM, had only one significant competitor may have increased the likelihood that it would find out about the ruling. In an industry with many competitors, a taxpayer would be less likely to find out that one (or even a few) of them had obtained a favorable ruling.  

Because of the risk of inconsistent tax treatment, some of those representing taxpayer interests believe letter rulings should be published, as long as there is appropriate redaction to protect taxpayer confidentiality. The Council On State Taxation [(COST)], a lobbying group representing the state tax interests of many Fortune 1000 companies, has adopted that position. “Simply put, ‘secret tax laws’ benefit neither the state in its administration of the statutes nor the public in complying with them,” COST wrote in its 2013 scorecard on state tax administration. COST added that “[w]hile individual taxpayers may perceive advantages in obtaining what they believe is a beneficial ruling, ultimately the broader taxing public pays the price for inconsistency in application of the tax laws.”  

Professor Allison Christians has persuasively argued that “[p]reserving trust generally requires that all taxpayers be subject to the same set of rules, while confidentiality leaves room for differential treatment that won’t be seen—and possibly protested—by the public.”  

C. Risks to Tax Advisers

Another risk of opaque rulings—the lack of a level playing field in tax representation—affects certain tax advisers (and thus, their clients). Note that the only parties who have access to a particular confidential tax ruling are members of the tax administration (who have access to every ruling), the taxpayer and/or tax advisor receiving the ruling, and anyone with whom that the computers were taxable should be retroactive rather than prospective. When we examine the agreed facts, we cannot escape holding that there was a clear abuse, that the circumstances compelled the Service to confine its ruling (when it was finally given) to the future period for which Remington Rand's computers were to be held taxable.”). The facts of the IBM case are unusual, and other taxpayers who have argued for an IRS “duty of consistency” generally have not been successful. See Lawrence Zelenak, Should Courts Require the Internal Revenue Service to be Consistent?, 40 TAX L. REV. 411, 422 (1985) (“later cases have limited IBM to its peculiar facts.”).  

This is particularly true for a taxpayer that is not advised by a large firm that advises other taxpayers engaging in similar transactions. Cf. Ring, supra note 41, at 195 (“The fear is that to the extent APAs are kept secret, those tax advisors (law firms and accountants) that are involved in APAs will have an advantage in retaining and assisting clients …, solely because the agreements are unpublished ….”).  

Maria Koklanaris, Private Letter Rulings Can Be a Costly, Secretive Affair, 82 ST. TAX NOTES 889, 889 (2016).  

Id.  

Christians, supra note 63, at 1123.  

It is certainly possible that not all tax administration employees could access all rulings. An article from 1967 states, that “advice [by the Tax Rulings Division] is not circulated to the staff of the IRS.
small group shares it.\textsuperscript{232} The unfairness of this selective access manifests itself both when comparing private tax advisors to IRS attorneys and when comparing one tax adviser to another, as discussed below.

1. “Fighting in the Dark”

When letter rulings are not published, tax administration employees likely have greater access to sources of legal authority than taxpayers and their representatives do. In 1953, a Senator described “the situation that used to exist where a taxpayer’s representative would confer with an agent and the agent would disagree with the taxpayer on the ground of a ruling about which the taxpayer could know nothing. It was a sort of fighting-in-the-dark situation.”\textsuperscript{233} This raises rule-of-law issues because “all laws should be prospective, open, clear, relatively stable and … the making of particular laws should be guided by open, stable, clear, and general rules.”\textsuperscript{234}

The IRS apparently was trying to eliminate the problem of IRS reliance on unpublished rulings at that time.\textsuperscript{235} Then-Chief Counsel of the IRS\textsuperscript{236} Mitchell Rogovin stated in 1965 that since the King Subcommittee hearings in 1951, the prior practice of Service personnel relying on unpublished materials has been discontinued. To this end the preface to the Cumulative Bulletin states “No unpublished ruling or decision will

\begin{flushleft}
\begin{itemize}
\item as a matter of routine. Thus, the average agent would be, as would the average taxpayer in the usual instance, ignorant of the ruling.” Kragen, supra note 210, at 335. However, that appears not to be true at all times. The comprehensive IRS indexing described in Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1301-02 (1973), facilitated access. See infra text accompanying notes 241-242. Modern technology makes sharing confidential documents internally even easier. A 1976 article astutely observes, “computer systems may eventually do an excellent job of assisting research into private rulings.” Earl G. Thompson, The Disclosure of Private Rulings, 59 MARQUETTE L. REV. 529, 542 (1976).
\item Portney, supra note 27, at 753 (“Private ruling letters remained private to the taxpayers to whom they were issued (plus anyone with whom they wished to share them”); Oran, supra note 206, at 837 (stating in 1973, “[a]lthough private letter rulings are not generally available to the public, such rulings are available to some tax practitioners, particularly those in large tax firms.”).
\item Hearings Before A Subcommittee of the Committee On Ways and Means, House of Representatives, 83d Cong., 1st Sess. on Administration of the Internal Revenue Laws (Part D) 1566 (1953) (remarks of Mr. Tobin). See also Sugarman, supra note 29, at 37 (mentioning the “criticism by practitioners that ‘secret rulings’ to field offices of the Service put the taxpayer at an unfair disadvantage in attempting to argue with revenue agents.”)
\item See Hearings, supra note 233, at 1566 (remarks of Mr. Sugarman).
\end{itemize}
\end{flushleft}
be cited or relied upon by any officer or employee of the Internal Revenue Service
as a precedent in the disposition of other cases.**237**

However, IRS citation of an unpublished ruling happened again in a case decided in 1967.**238**

Even if the tax administration does not cite non-public rulings, nontransparent rulings provide the administration with greater insight than private practitioners have into trends in how the tax administration is interpreting the law. Tax administration positions may evolve over time in a series of rulings.**239** A 1972 article stated that “[i]n some specialized areas of tax practice, individual rulings constitute the only existing Service interpretation of the law. In other fields, private rulings conflict with the published position of the IRS.”**240**

In addition, regardless of how often the IRS cited unpublished rulings in litigation, they served as a body of knowledge for IRS personnel. It appears that in the era in which most IRS letter rulings were not generally published, the IRS catalogued and indexed the rulings that it thought had future value. An opinion published in litigation brought by Tax Analysts described the IRS’s filing process for letter rulings and technical advice memoranda as follows:

[Certain] letter rulings and [technical advice] memos are deemed to have a continuing “reference” value for internal IRS purposes, and these are placed in the IRS’ permanent reference file … *The reference file is organized by code section and an “index-digest” card file is maintained, giving citations to the main “reference” file and usually summarizing the contents of the reference file.***241**

Moreover, prior to 1967, this IRS file system “was called the ‘precedent’ file.”**242**

2. “Private Libraries”

During the period of nontransparent IRS letter rulings, some large tax advisors amassed collections of rulings that helped them understand the IRS’s views on specific issues.**243** This

---

238 United States Thermo Control Co. v. United States, 178 Ct. Cl. 561, 564-65 (1967) (stating that the government, to support its argument, had submitted an IRS affidavit from the Chief of the Excise Tax Branch “who states that private rulings have consistently held that truck and trailer refrigeration units were subject to the automotive parts and accessories tax.”).
239 See James P. Holden & Michael S. Novey, *Legitimate Uses of Letter Rulings Issued to Other Taxpayers—A Reply To Gerald Portney*, 37 Tax Law. 337, 340 (1984) (“letter rulings are . . . to some extent a medium through which the Service can, on a case-by-case basis, develop or extend such an interpretation. As such, they do not merely reflect preexisting interpretations but rather constitute an integral part of the process by which such interpretations come into existence.”).
242 *Tax Analysts & Advocates*, 362 F. Supp. at 1305. The renaming was apparently time-intensive. “Files occupying over two thousand linear feet of shelf space were laboriously restamped ‘reference’ in place of ‘precedent.’” *Id.* at 1305 n.35 (*citing* Simmons Dep. at 18, 58-59).
could provide them with an advantage over tax advisors who did not have numerous clients requesting tax rulings. The same thing reportedly happened in the 1990s with APAs: “private libraries of APAs started developing in the major public accounting and law firms . . . .” Professor Diane Ring has observed, “[o]stensibly, the government has no interest in some taxpayers being better advised than others, nor would it seek affirmatively to provide a profitable specialty to a limited pool of advisors.”

Some U.S. tax advisers reportedly would exchange unpublished letter rulings with other advisers, likely because “an attorney providing a ruling to his counterpart in another firm can expect the favor to be returned.” This expanded the circle of insiders but still kept rulings from being widely available.

The same issue of private libraries of access available only to select insiders can arise in U.S. states that do not publish letter rulings. In Kentucky during the period that rulings were not published, an article reported that “the DOR’s failure to publish its written guidance greatly benefits large tax practices, which can accumulate and rely on legal guidance that is unavailable to smaller firms or individual taxpayers. [A lawyer] . . . described one colleague’s accumulation of guidance as ‘a treasure trove’ . . . .” Accordingly, at least in the United States, confidential tax rulings have resulted in a private bodies of knowledge fully accessible to the tax administration and partly accessible to large tax advisers but unavailable to the general public and most smaller firms.

The next Part of this Article first discusses the range of possible disclosure options and which of the concerns discussed in this Section each one would remedy. It then examines potential costs of full disclosure.

### III. POSSIBLE DISCLOSURE REMEDIES AND POTENTIAL COSTS

#### A. A Range of Disclosure Remedies

The obvious remedy for risks stemming from lack of transparency is increased disclosure. The question then becomes how much transparency is appropriate. At one theoretical extreme, selected rulings could be disclosed to limited reviewers to provide targeted oversight.

---


244 Oran, supra note 206, at 838 (“As a result of the Service’s stance against full disclosure, those who privately obtain a large sample of letters may receive a competitive advantage.”).

245 Kaye, supra note 107, at 1193.

246 Ring, supra note 41, at 195.

247 Reid, supra note 88, at 29.

248 See id. (“It is unlikely that a member of the general public, with nothing to offer in exchange, will be able to obtain such information from a private tax attorney.”).

249 Carr, supra note 209, at 304.
At the other theoretical extreme, all rulings could be made public. This Section discusses a range of parties to whom rulings could be disclosed.\textsuperscript{250}

Any disclosure would come with costs, as discussed in the next Section. In order to facilitate comparison of the costs and benefits of various types of disclosure of rulings, this Section identifies four general types of disclosure and which of the risks these types of disclosure would address.

1. Disclosure to Other Countries

Exchange or disclosure of tax ruling information to other countries is a remedy targeted at addressing the risk of a ruling-issuing country imposing negative externalities on other countries.\textsuperscript{251} This type of approach has been undertaken by both the European Commission and the OECD, as described in this Section. The documents exchanged are not anonymized.\textsuperscript{252}

\textit{a. The European Commission’s Approach}

Shortly after LuxLeaks, the European Commission took actions to increase rulings transparency, to implement its Base Erosion and Profit-Shifting (BEPS) project.\textsuperscript{253} Before that, “[t]he old version of the [Council] Directive on administrative cooperation in the field of taxation already provided for the mandatory spontaneous exchange of information among EU Member States, but in reality countries shared little data with one another about their cross-border tax rulings.”\textsuperscript{254}

\begin{footnotesize}
\textsuperscript{250} This Section does not focus on the range of disclosure options with respect to the documents’ contents. Instead, it generally assumes that only the level of redactions needed for anonymization (where disclosure would be to recipients other than other countries’ tax administrations) would be made. With respect to APAs, other possible levels of disclosure include (1) mere transfer pricing methodologies, see infra text accompanying notes 302-372 and accompanying text, and (2) “‘best practice’ templates based on actual APA settlements,” Eden & Byrnes, supra note 52, at 26.

\textsuperscript{251} See \textit{Combatting Corporate Tax Avoidance}, supra note 127, at 2.12 (“Publicly disclosing all tax rulings would not be any more effective than automatic exchange between tax administrations, from the point of view of Member States’ ability to react to abusive practices.”).

\textsuperscript{252} See infra text accompanying note 258 (European Commission exchanges); OECD, OECD/G20 \textit{BASE EROSION AND PROFIT SHIFTING PROJECT, COUNTERING HARMFUL TAX PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE, ACTION 5—2015 FINAL REPORT 78} (2015), https://dx.doi.org/10.1787/9789264241190-en. (Annex C, OECD’s “Instruction Sheet for the Template on Exchange of Information on Rulings” states with respect to box 2 of the template, “This box includes all the information necessary to identify the taxpayer and determine its association with a multinational enterprise (MNE) group.”)


\textsuperscript{254} Brodzka, supra note 133, at 9. “It was at the discretion of the country itself to decide whether a tax ruling might be relevant to another EU Member State. In practice the efficient spontaneous exchange of information took place rather rarely.” \textit{Id}.
\end{footnotesize}
On March 18, 2015, Commissioner Moscovici presented the Commission’s package of tax transparency measures designed to address “corporate tax avoidance and harmful tax competition in the EU.”

The European Council adopted the Directive to Exchange Cross-Border Rulings on December 8, 2015, stating that an increase in transparency was urgently required.

The Tax Transparency Package applies broadly to cross-border advance tax rulings and APAs. It “includes all intra-EU cross-border tax rulings issued by member states and adopts an approach based on automatic exchange coordinated through the EU Commission.” Since 2017, it has required automatic exchange of detailed information (including company names and transaction amounts) about both past and future advance rulings among E.U. members’ tax administrations. Rulings information must be shared every six months. Member States can also request the full text of a ruling.

---

255 Id.
256 See 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,” at (6) (“The scope of these definitions should be sufficiently broad to cover a wide range of situations, including but not limited to the following types of advance cross-border rulings and advance pricing arrangements: — unilateral advance pricing arrangements and/or decisions; — bilateral or multilateral advance pricing arrangements and decisions; . . . .”), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2376&from=en; see also Brodzka, supra note 133, at 9 (“New rules define the tax rulings quite widely, in order to capture all similar instruments and irrespective of the actual tax advantage involved, as any communication (or other instrument or action of similar effect), given by or on behalf of a Member State, regarding the interpretation or application of its tax laws. The scope of the automatic exchange includes advance cross-border rulings and advance pricing arrangements, of any material form, irrespective of their binding or non-binding character and the way they are issued.”).
257 Waerzeggers & Hillier, supra note 234, at 9 n.22.
258 Council Directive (EU) 2015/2376 of 8 December 2015, supra note 256, at Art. 8A § 1 (“The competent authority of a Member State, where an advance cross-border ruling or an advance pricing arrangement was issued, amended or renewed after 31 December 2016 shall, by automatic exchange, communicate information thereon to the competent authorities of all other Member States as well as to the European Commission, with the limitation of cases set out in paragraph 8 of this Article, in accordance with applicable practical arrangements adopted pursuant to Article 21.”).

The deadline under the EU Council Directive to share information on past rulings (those issued or modified between 2012 and 2016) was December 31, 2017. Id. at Art. 8A § 5(b) (“The exchange of information shall take place as follows: . . . in respect of the information exchanged pursuant to paragraph 2—before 1 January 2018.”).
259 Id. at Art. 8A § 5(a) (The exchange of information shall take place as follows: . . . “in respect of the information exchanged pursuant to paragraph 1—within three months following the end of the half of the calendar year during which the advance cross-border rulings or advance pricing arrangements have been issued, amended or renewed”).
260 Id. at Art. 8A § 10 (“Member States may, in accordance with Article 5, and having regard to Article 21(4), request additional information, including the full text of an advance cross-border ruling or an advance pricing arrangement.”).
It is also important to note the limits to the transparency required by the new procedures. For example, the E.U.’s ruling exchange process makes use of the European Commission but the Commission does not itself have access to all of the information exchanged:

[T]he EU Member States decided that the Commission should only have access to “a limited set of basic information” about APAs and other advance tax agreements issued by Member States. They also decided that the Commission should not have access to information about which multinational corporations have obtained such agreements, or any summary of the content. 261

This restriction likely is an effort to try to forestall additional State aid investigations.262 In fact, “Member States … underlined that the Commission may not use [the rulings] information for any other purpose other than to monitor and evaluate the effective application of the automatic exchange between Member States themselves.”263

In addition, the use of rulings information for enforcement purposes by E.U. countries that feel disadvantaged by rulings issued by other countries may also be limited, despite several high-profile State aid cases:

In its state aid cases, the European Commission has taken several years to investigate even a small number of agreements. . . . It is difficult to imagine that country tax administrations that already struggle with lack of resources will have an easier time challenging the tax practices of other Member States.264

Nonetheless, exchange of tax ruling information with other countries should help decrease the likelihood that a country will use its rulings process to shift tax base away from other countries because of the increased accountability such exchanges provide.265

b. The OECD’s Approach

The OECD has also implemented exchanges of ruling information. Action 5 of the OECD’s BEPS project (Harmful Tax Practices), requires exchange of summaries of rulings266

261 Ryding, supra note 71.
262 Mason, supra note 253, at 371 n.125 (“The rulings-exchange regime negotiated as part of BEPS …—a regime which the Commission was denied access—can be understood as an effort to ward off further intrusive state-aid investigations of member state ruling practices.”).
263 Ryding, supra note 71.
264 Id. (footnote omitted). State aid is discussed in text accompanying notes 135-148.
with the jurisdictions connected to the ruling. The United States is a member of the “OECD/G20 Inclusive Framework on BEPS.” BEPS’ goals generally are enforced through peer monitoring.

“It has been agreed that information on rulings that have been issued on or after 1 January 2010 and were still in effect as from 1 January 2014 must be exchanged.” For qualifying rulings issued on or after April 1, 2016, the taxpayer is required to complete a template in conjunction with the ruling request and to provide the taxpayer’s view on whether the ruling falls within the transparency framework. Unlike the European Commission’s Tax Transparency Package, the OECD template does not mandate inclusion of monetary figures, such as transaction amounts. The IRS thus releases via this process certain high-level information, not actual rulings. An IRS employee has stated that “if, after receiving a template, a country wanted the actual ruling, its tax administration could request it. However, if a country needed to see the actual ruling, it would have to make the request under the regular exchange of information process, subject to the usual treaty requirements.”

---

267 “As a general rule, exchange of information on rulings . . . need to take place with: a) The countries of residence of all related parties with which the taxpayer enters into a transaction for which a ruling is granted or which gives rise to income from related parties benefiting from a preferential treatment (this rule also applies in a PE context); and b) The residence country of the ultimate parent company and the immediate parent company.” OECD, supra note 252, at 54.


269 See Allison Christians, BEPS and the New International Tax Order, 2016 B.Y.U. L. REV. 1603, 1605-1606 (2016) (“The parameters of compliance with many of the BEPS norms will not be clear until countries agree to terms of reference for peer review, which will occur within one or more subsidiary network bodies.”).

270 OECD, supra note 252, at 54.


272 See Council Directive (EU) 2015/2376 of 8 December 2015, supra note 256, at (6) (“The information to be communicated by a Member State pursuant to paragraphs 1 and 2 of this Article shall include the following: . . . (g) the amount of the transaction or series of transactions of the advance cross-border ruling or advance pricing arrangement if such amount is referred to in the advance cross-border ruling or advance pricing arrangement; (h) the description of the set of criteria used for the determination of the transfer pricing or the transfer price itself in the case of an advance pricing arrangement . . . .”).


274 I.R.M. 4.60.1.3.3(3) (10-15-2018).

Action 5 also applies only to certain types of rulings. “The OECD initiative specifically focuses on rulings pertaining to preferential tax regimes and other arrangements which impact or are likely to impact the tax position in one or more other countries, and adopts an approach based on mandatory spontaneous exchange.”\textsuperscript{276} There are six categories of rulings requiring automatic exchange, including certain types of letter rulings and “cross border unilateral advance pricing arrangements (APAs) or other unilateral transfer pricing rulings.”\textsuperscript{277} The IRS therefore does not apply Action 5 to bilateral or multilateral APAs.\textsuperscript{278} Bilateral APAs are thus generally shared only with the other country that is a party to the APA. Most U.S. APAs are bilateral: in 2018, the IRS executed 81 bilateral APAs, 24 unilateral APAs, and only 2 multilateral APAs.\textsuperscript{279} From 1991 to 2017, those figures totaled 1,108; 590; and 15, respectively.\textsuperscript{280}

Exchanges under BEPS Action 5 began in 2016, with respect to past rulings.\textsuperscript{281} Since 2017, the OECD has published annual reviews of the implementation of Action 5.\textsuperscript{282} OECD statistics show that other countries generally did not identify nearly as many past rulings as Luxembourg did, as shown in the table below, which reflects the OECD’s figure reported in 2019 of 1,922 past rulings. That figure was even larger in the OECD’s 2017 report, which refers

\begin{itemize}
\item \textsuperscript{276} Waerzeggers & Hillier, supra note 234, at 9 n.22.
\item \textsuperscript{277} OECD, supra note 252, at 10. The five items besides unilateral APAs are “(i) rulings related to preferential regimes; … (iii) rulings giving a downward adjustment to profits; (iv) permanent establishment (PE) rulings; (v) conduit rulings; and (vi) any other type of ruling where the FHTP agrees in the future that the absence of exchange would give rise to BEPS concerns.” \textit{Id}.
\item \textsuperscript{278} See I.R.M. 4.60.1.3.3(3) (10-15-2018) (providing a list similar to that in supra note 277 and accompanying text).
\item \textsuperscript{279} IRS, APA Announcement, supra note 17.
\item OECD, supra note 252, at 67 (“Information on future rulings should start to be exchanged from 1 April 2016 and countries have until the end of 2016 to exchange information on past rulings.”). In general, “past rulings” are qualifying rulings issued between January 1, 2010 and March 31, 2016. OECD, \textit{Harmful Tax Practices—Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5} (2018), at 264, https://doi.org/10.1787/7cc5b1a2-en (hereinafter, OECD, 2018) (“For Luxembourg, past rulings are any tax rulings within the scope that are issued either: (i) on or after 1 January 2014 but before 1 April 2016; or (ii) on or after 1 January 2010 but before 1 January 2014, provided they were still in effect as at 1 January 2014.”).
\end{itemize}
instead to 5,600 past rulings.\textsuperscript{283} The 2017 report also states in the “Jurisdiction’s response and recent developments” that “[a]s at 18 October 2017, the process to identify all past rulings had been completed. 7894 exchanges on past rulings had occurred.”\textsuperscript{284}

OECD statistics also show that the volume of rulings in Luxembourg significantly decreased after 2016, in contrast with most of the other European countries shown in the table below.\textsuperscript{285} Possible causes of this decrease are discussed below.\textsuperscript{286}

\textbf{Number of Rulings Subject to BEPS Action 5 (Selected Countries)}

<table>
<thead>
<tr>
<th>Country</th>
<th>Past Rulings</th>
<th>Rulings Issued Apr. 1 to Dec. 31, 2016</th>
<th>Rulings Issued in 2017</th>
<th>Rulings Issued in 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>202</td>
<td>15</td>
<td>13</td>
<td>10</td>
</tr>
<tr>
<td>Belgium</td>
<td>586</td>
<td>57</td>
<td>107</td>
<td>103</td>
</tr>
<tr>
<td>France</td>
<td>45</td>
<td>4</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Germany</td>
<td>30</td>
<td>7</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Ireland</td>
<td>29</td>
<td>0</td>
<td>2</td>
<td>39</td>
</tr>
<tr>
<td>Italy</td>
<td>58</td>
<td>39</td>
<td>123</td>
<td>308</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>1,922\textsuperscript{287}</td>
<td>73</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>2,204</td>
<td>297</td>
<td>214</td>
<td>272</td>
</tr>
<tr>
<td>Norway</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Poland</td>
<td>84</td>
<td>6</td>
<td>20</td>
<td>16</td>
</tr>
<tr>
<td>Portugal</td>
<td>24</td>
<td>2</td>
<td>11</td>
<td>11</td>
</tr>
<tr>
<td>Spain</td>
<td>146</td>
<td>28</td>
<td>46</td>
<td>22</td>
</tr>
<tr>
<td>Sweden</td>
<td>28</td>
<td>5</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>599</td>
<td>71</td>
<td>16</td>
<td>19</td>
</tr>
<tr>
<td>United States</td>
<td>114</td>
<td>21</td>
<td>30</td>
<td>27</td>
</tr>
</tbody>
</table>

\textsuperscript{283} OECD, 2017, \textit{supra} note 271, at 189.
\textsuperscript{284} \textit{Id.} at 196. The rulings process was decentralized before 2015, so it took a while for Luxembourg’s tax authority to identify and classify all of the rulings. \textit{See} OECD, 2017, \textit{supra} note 271, at 190 (explaining the manual process, which included asking taxpayers and tax advisors for assistance); \textit{id.} at 192 (“[A]s Luxembourg had to search through a large number of past rulings which were not centrally issued, the process for identifying past rulings and for classifying them according to the Action 5 categories is still underway. As of June 2017, 4615 past rulings had been identified.”).
\textsuperscript{285} OECD, 2019, \textit{supra} note 282, at 57, 149, 162, 200, 212, 263, 298, 310, 335, 340, 404, 412, 441, 446. The countries shown in the table are a subset of those discussed in the report. Some of the figures for previous years are different in earlier reports. \textit{See}, e.g., OECD, 2018, \textit{supra} note 281, at 328 (stating that the Netherlands issued 2,198 past rulings for the applicable period, not 2,204, and 213 rulings for 2017, not 214), 344 (stating that Norway issued no rulings in 2017, not 1).
\textsuperscript{286} \textit{See infra} text accompanying notes 403-408.
\textsuperscript{287} This is the figure reported in 2019. The figure reported previously was larger. \textit{See supra} text accompanying note 283.
2. Disclosure to a Domestic or International Oversight Body

Both the European Commission’s approach and the OECD’s approach involve disclosure of non-anonymized rulings summaries to other affected countries, so that countries can monitor each other. Although, as discussed above, the European Commission has pursued some State aid investigations based on tax rulings, the Commission has access to only limited information from the exchanges. The exchange process is not designed to give it an oversight function.

It would be possible to require disclosure of tax rulings to a domestic or international group that is designed to be a centralized watch dog. Such a group would have an enforcement function, with the behavior targeted being issues of concern domestically or internationally. The rulings shared presumably would not be anonymized but would be kept confidential. An international oversight group could address risks that countries face from other countries’ tax rulings, although that particular issue is already the target of the European Commission and BEPS Action 5.

A domestic oversight group should not be located within the tax administration, because that would likely facilitate capture by the tax administration. The idea would be to have a structurally independent body that would review issued rulings and could investigate the rulings

---

288 See supra text accompanying notes 135-146.
289 See supra text accompanying note 263. For example, in 2014, the European Commission asked Member States for “a list of all companies that have received a tax ruling from 2010 to 2013.” European Commission, State aid: Commission extends information enquiry on tax rulings practice to all Member States (Dec. 17, 2014), https://ec.europa.eu/commission/presscorner/detail/es/IP_14_2742.
290 It is worth noting the existence of the Code of Conduct Group, which “[t]he EU’s Finance Ministers established …. on 9 March 1998, under the chairmanship of UK Paymaster General Dawn Primarolo, to assess the tax measures that may fall within the scope of the Code of Conduct for business taxation.” European Commission, Harmful Tax Competition, https://ec.europa.eu/taxation_customs/business/company-tax/harmful-tax-competition_en#heading_0. The two principal problems with the Code of Conduct Group are (1) that it “ha[s] no enforcement mechanism,” Mason, supra note 140, at 458, and (2) it lacks transparency. See Hans Gribnau, Soft Law And Taxation: EU and International Aspects, 2 LEGISPRUDENCE 116 (2008) (“[T]he Code [of Conduct], managed in secret, does not score well in terms of transparency and input legitimacy and perhaps even output legitimacy may be affected.”); Martijn F. Nouwen, The European Code of Conduct Group Becomes Increasingly Important in the Fight Against Tax Avoidance: More Openness and Transparency is Necessary, 45 INTERTAX 138, 139, 140 (2017) (referring to the Group’s “enormous lack of transparency” and therefore finding it “difficult to delineate its fields of operation.”). However, “[t]he Code … does have political force.” European Commission, Harmful Tax Competition, supra. “It is certain that the report of the Code of Conduct Group of 1999 was watched closely and followed up by … the European Commission (in ascertaining where an investigation into Fiscal State Aid could be done).” Elly Van De Velde, Overview of Existing EU and National Legislation on Topics Covered by TAXE Mandate 21 (2015).
291 See Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 TEX. L. REV. 15, 17 (2010) (“[T]he creation of an independent agency is often motivated by a concern with agency capture.”). Cf. Steven G. Calabresi & Nicholas Terrell, The Fatally Flawed Theory of the Unbundled Executive, 93 MINN. L. REV. 1696, 1703 (2009) (“Today, we realize how easy it is for special-interest groups and factions to capture the so-called independent regulatory agencies just as it is easy for them to capture the oversight committees.”).
process as needed. It could be an existing body, such as a committee within the legislature charged with fiscal matters, but it would have to be one with sufficient tax expertise to monitor tax rulings.\footnote{For example, in the UK, “the PAC [(Public Accounts Committee)] covers a very wide range of topics besides taxation and has no formal advisers on taxation.” Judith Freedman, \textit{Managing Tax Complexity: The Institutional Framework For Tax Policy-Making And Oversight} (Working Paper, 2015), https://core.ac.uk/reader/288287950.} For example, Tom Field suggested that the Joint Committee on Taxation could oversee U.S. APAs.\footnote{Thomas F. Field, \textit{Needed: Effective APA Oversight}, 102 \textit{TAX NOTES} 419, 420 (2004).}

Such a domestic body could focus on several types of risks. On the country level, it could watch the rulings issued for signs of corruption or favoritism of particular taxpayers by tax administrators. It could also look for substantive errors\footnote{See Oran, \textit{supra} note 206, at 839 ("Questioning of letter rulings—whether by other practitioners pressing for a different result, ‘public watchdogs,’ members of Congress, or legal scholars—would tend to prevent the perpetuation of mistakes that may creep into the system because of the limited review now available for letter rulings and the limited input received from outside the Service.") (footnote omitted).} and monitor consistency across rulings. However, this “watch dog” approach would not facilitate equal access to past rulings or the rulings process, nor would it keep large tax practices from compiling libraries of rulings that their competitors do not have.

3. Disclosure to Tax Advisers

Another theoretically possible approach would be to share rulings only with tax advisers. The rulings could be anonymized, as the goal would be to share the reasoning of the rulings, rather than to connect rulings to specific taxpayers. This would allow tax advisers to give fully informed advice, and could foster tax compliance by alerting them to problems with particular tax positions.\footnote{Australian Inspector-General, \textit{supra} note 243, at ¶ 4.61.} It would also help taxpayers learn of rulings obtained by competitors.

A much more limited version of this approach existed in the United States prior to publication of letter rulings in 1976. First, with respect to competitors in an industry, “private rulings [we]re frequently noted in commercial trade journals or industrial newsletters, so that one member of an industry association can share his private ruling with his fellow members.”\footnote{Reid, \textit{supra} note 88, at 29.} Second, “rulings [we]re also described in tax periodicals and topical reporters” received by tax advisers.\footnote{\textit{Id.}} That limited circulation was criticized at the time:

\begin{quote}
Such publication, however, does not provide general dissemination of the rulings. Industry publications are often available only to individuals on a selected mailing list. Although tax periodicals are not similarly restricted, the rulings are not
\end{quote}
reported in sufficient detail to be of value to a taxpayer who is not able to obtain a copy of the ruling itself.\textsuperscript{298}

Comprehensively sharing rulings with tax advisers would constitute fairly wide distribution. To limit the possibility that this would amount to de facto public distribution of rulings, circulation could be limited to lawyers and certified public accountants in good standing who sign an agreement to keep the rulings confidential. Disclosure of rulings received could be made a violation of ethical standards subject to sanction. However, implementing such a system would be a significant undertaking that would mainly serve to level the playing field for tax advisers and help taxpayers with tax advisers. It would not accomplish disclosure goals related to countries, nor would it allow taxpayers to access rulings without a tax adviser.

4. Disclosure to the Public

Of course, it is possible to have issued rulings simply made completely public, presumably anonymized. This has been how the U.S. federal system for private letter rulings has operated since 1976. Many U.S. states follow a similar approach.\textsuperscript{299} Transparency does not seem to have reduced the volume of IRS letter rulings, as discussed below.\textsuperscript{300}

APAs are thought to present special concerns about the disclosure of confidential information, however.\textsuperscript{301} Because of these concerns, even when the Bureau of National Affairs brought suit in the 1990s seeking APA disclosure, it only sought disclosure of the transfer pricing methodology approved.\textsuperscript{302} However, such concerns may be overstated, as detailed below.\textsuperscript{303} Still, even the type of disclosure sought by BNA would provide more information than is currently available or in general templates because it would show methodologies actually approved by the tax administration.

Disclosure to the public would address all of the risks raised in the previous Section. Although disclosure is after the fact in most contexts, not prior notification,\textsuperscript{304} it would greatly

\textsuperscript{298} Id.

\textsuperscript{299} Griffith et al. Part 2, supra note 98, at 333 (“Approximately 45 states and the District of Columbia offer private letter rulings, and of those about 35 make them available for the public, typically by publishing a redacted version on the department of revenue’s website.”).

\textsuperscript{300} See infra text accompanying notes 387-393 (reporting statistics).

\textsuperscript{301} See Michael J. McIntyre, The Case for Public Disclosure of Advance Rulings on Transfer Pricing Methodologies, 2 TAX NOTES INT’L 1127, 1128-29 (1990) (“Surely it is generally appropriate—even required—that the Service keep sensitive details of a taxpayer’s pricing strategy out of the public domain.”).

\textsuperscript{302} See supra text accompanying note 107.

\textsuperscript{303} See infra notes 352-353 and accompanying text.

\textsuperscript{304} An exception is that EU countries are required to notify the European Commission before implementing a measure that may constitute prohibited State aid. See European Commission, State Aid Procedures, https://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html (last visited July 20, 2020) (“EU State aid control requires prior notification of all new aid measures to the Commission. Member States must wait for the Commission’s decision before they can put the measure into effect.”). However, “[b]ecause EU member states have not generally contemplated the possibility that
increase accountability. Disclosure to the public that is as complete as possible while protecting confidential taxpayer information— as is the case for IRS letter rulings— levels the playing field across taxpayers and tax advisers, and enables the general public, watchdog groups, and other countries’ tax administrations to monitor the rulings produced. Such transparency, in other words, keeps everyone accountable. Of course, transparency has costs as well as benefits, however. These potential costs are discussed in the next Section.

B. Potential Costs of Transparent Tax Rulings

A 1976 article raised the concern about publication of existing IRS letter rulings that “[w]hile the information explosion increases the possible service the professional can offer his client, costs will increase as well. Disclosure could mean that only taxpayers with great means could authorize counsel to review all available material.” However, technological developments since then have greatly reduced search costs. In addition, before rulings were published, a taxpayer might have had to incur the expense of hiring a large firm just to have access to a subset of them.

Other arguments in favor of keeping tax rulings confidential include the following: (1) they are of limited use because they lack precedential value, (2) taxpayers will rely on them

---

individual rulings or ruling systems would constitute state aid, the EU member states have generally not notified the EC of their rulings or tax ruling system.” Nicholas J. DeNovio et al., State Aid: What It Is, and How It May Affect Multinationals and Tax Departments, TAX EXEC. (Apr. 6, 2016), https://taxexecutive.org/state-aid-what-it-is-and-how-it-may-affect-multinationals-and-tax-departments/.

See Blank, supra note 25, at 458-59 (“A broad definition of ‘tax transparency,’ … is that it is the government’s openness regarding its tax rules, agency interpretations, decisionmaking processes, and enforcement practices. Transparency generally serves two functions, which apply equally in the context of tax administration: democratic governance and accountability.”).

Thompson, supra note 241, at 544.

Significant quantities of outdated rulings are apparently a problem in Australia. Australian Inspector-General, supra note 243, at ¶ 4.88 (“[T]here are currently 80,000 edited private rulings on the register, some of which are clearly wrong and out of date. There is therefore a legitimate concern that the current register has created a mass of material for taxpayers and their advisers to decipher.”). The Inspector-General suggested a few methods for addressing this. See id. at 3.48, 4.89. The Australian Taxation Office could also develop a process for removing withdrawn or superseded rulings.

See supra text accompanying notes 243-245.

A 1976 article lists the following additional concerns about publication of letter rulings: (1) “Increasing Disparity of Service for Taxpayers of Varying Means”; (2) “Reactionary Legislation,” referring to Congressional proposals in light of the Tax Analysts litigation; (3) “Private Rulings Not Easily Readable”; (4) “Disagreement Within the Internal Revenue Service On Persuasive Weight of Particular Rulings”; and (5) “Disclosure Can Impair the Vitality of the Internal Revenue Service Deliberative Process.” Thompson, supra note 241, at 544-46. The first issue is addressed in supra text accompanying note 306. The second issue was subsequently resolved by Congress’s passage of IRC § 6110. The Thompson article states that “[n]arrowing the gap between the disclosure demanded in Tax Analysts II and that palatable to the Internal Revenue Service is proposed new Internal Revenue Code section 6110, drafted in late 1975 by the Service, the Office of the Assistant Secretary of the Treasury, the
despite their non-precedential nature, (3) they will reveal confidential taxpayer information, (4) disclosure will decrease the volume of ruling requests, and (5) published rulings are more costly to produce. Each of these arguments is discussed, in turn, below.

1. Are Disclosed Tax Rulings Useless?

If a ruling applies only to the taxpayer who received it, that may suggest that rulings lack value for other taxpayers. For example, before letter rulings were made public, one commentator reported that “the position of the IRS . . . [is] that a private ruling is of no value to any taxpayer other than the one to whom the ruling is given, because 'no unpublished ruling or decision will be relied on, used, or cited, by any officer or employee of the Service as a precedent in the disposition of other cases.'” However, the author questioned the factual premise that the IRS did not rely on previous letter rulings in other cases. As discussed above, the IRS apparently did rely on previous, unpublished letter rulings at least some of the time.

Even if the tax administration does not cite its rulings in other cases, rulings can provide a helpful view into what the tax administration’s position is on the law. It is better to have

---

309 That is the case in the United States. See I.R.C. § 6110(k)(3). Cf. Edward Andersson, General Report, Advance Rulings by the Tax Authorities at the Request of A Taxpayer, IFA CAHIERS DE DROIT FISCAL INTERNATIONAL, Vol. 50b 23 (1965) (distinguishing between court precedents and rulings issued “by fiscal authorities or special organs,” which “can never be expressly binding in respect of other similar cases” but observing that “[i]f the tribunal which gives the advance rulings has sufficient authority and if its decisions are published, its opinions may in fact become precedent and thus unify judicial application.”).


311 See id. at 29-32. See also Holden & Novey, supra note 239, at 345 (“Though examining agents are instructed not to use such written determinations ‘as precedents,’ they are encouraged to use them “as a guide with other research material in formulating a district office position on an issue.”) (citing 41 I.R.M. § 424(14)3(3)).

312 See supra notes 236-242 and accompanying text; see also supra note 311.
official, published guidance, but in the absence of such guidance, rulings can provide insights. “[P]ublication is above all important in respect of decisions on the construction of new legislation as it usually takes longer before decisions by the court of supreme instance can be obtained in these cases by normal appellate procedure.” Beyond that, tax administration policy on a particular tax issue can evolve, and private rulings may reveal that trend.

The fact that U.S. attorneys tried to obtain others’ rulings even when they were unpublished suggests that they have value. During that period, “lawyers who are experienced in obtaining private rulings state[d] that reference to an analogous letter ruling can help in negotiating with the Service for a ruling desired by the client.” Such access to previous rulings helped avoid inconsistent treatment of taxpayers. Others’ rulings were sometimes helpful in litigation, as well. Thus, the argument that disclosed rulings are useless to other taxpayers should carry little weight.

2. Taxpayer Use of Others’ Rulings

Another possible concern is that if taxpayers access others’ letter rulings, they will use them. One concern may be the cost of counsel searching for relevant rulings. However, such research costs likely are lower than the costs of applying for one’s own ruling (including what may be a large fee charged by the tax administration).

A related issue is what taxpayers will do with others’ rulings. For example, in North Carolina, the Revenue Department reportedly was concerned that if taxpayers and their representatives had access to guidelines regarding when affiliated corporations would be

---

313 It is possible for some issues to have been addressed only in private rulings. Cf. Andersson, supra note 309, at 22 (“In Finland it is striking so many questions have been raised in advance rulings matter which, as far as one knows, have never been brought up for adjudication by the Supreme Administrative Court.”).
314 Id. at 22.
315 Reid, supra note 88, at 33 n.56.
316 See id. at 33.
317 Id.
318 See infra Part II.B.2.
319 See Douglas H. Walter, The Battle for Information: Strategies of Taxpayers and the IRS to Compel (or Resist) Disclosure, 56 TAXES 740, 741 (1978) (“In a recent Tax Court case, Franco Corelli, … the Tax Court ruled that a favorable private ruling and related documents issued to a different party to the same transaction were relevant to whether the taxpayer was liable for the negligence penalty, and hence could be reached by discovery…. [I]n United States v. Wahlin, … the taxpayer had been indicted for failure to pay manufacturers excise taxes and sought copies of a variety of private rulings. The court stated flatly that ‘the defendant here is entitled to rely on the private rulings in defense of his criminal case.’”) (citations omitted).
321 This is a problem in Australia due to the disorganization of the rulings register and the lack of a process to remove outdated and superseded rulings. See supra note 306.
322 See supra note 126 and accompanying text.
required to be combined, “it ‘would be like handing a gun to the guy that is about to rob us.’”

The Department was so concerned about this risk that, although its own agents were clamoring for guidelines, it refused to issue them: “part of it is also because of a legit fear that if we communicate ‘guidelines’ to our audit staff, these will eventually fall into the hands of the dreaded Jung Hoard [sic] (also known as [taxpayers] and their representatives) and will be used against us.”

Thus, the Revenue Department essentially shot itself in the foot to avoid providing taxpayer representatives with guidance.

Cara Griffith, CEO of Tax Analysts, explained that, in Oregon, “[a] Department of Revenue (DOR) official responded that if the [Department’s ruling] guidance was publicly available, other taxpayers might use it. I was taken aback by the honesty.”

She points out that “the DOR’s rationale—that guidance must be kept secret because someone could misunderstand it—could just as easily be offered as an excuse to keep the Oregon Revised Statutes secret or to lock away Oregon Supreme Court decisions.”

Although private rulings lack the general applicability that statutes or case law do, such rulings are nonetheless informative, as tax practice reflects. Access by taxpayers should be considered a feature, not a bug. If the concern is that taxpayers will treat others’ rulings as precedential, that can be addressed by statute, as U.S. federal tax law does.

3. Would Confidential Taxpayer Information Be Disclosed?

The privacy of confidential taxpayer information is an important issue that arises in the rulings context. For example, in 1995, the OECD specifically urged in the APA context that tax administrations be sensitive to this issue. In the letter ruling context, the U.S. has addressed the issue via required redactions of such things as identifying information and trade secrets.

Even in the 1950s, before all of its letter rulings became public, the IRS determined how to

---


324 Id. at *52 (“The Department’s lack of guidance made even its own auditors confused. They repeatedly requested guidelines.”).

325 Id. at *53 (quoting Email from David Simmons to Gene Chavis, et al. (Mar. 21, 2006, 17:57 EST.).) The reference is supposed to be to the Jun horde from the movie The Beastmaster. Cara Griffith, Tax Policy in an Age of Cynicism, 92 ST. TAX NOTES 580 (2019).

326 Griffith, supra note 325, at 575. The Oregon Department of Revenue representative reportedly explained that “‘We haven’t made private guidance letters publicly available mainly due to the risk of taxpayers relying on the advice that may or may not apply to them based on different circumstances.’”

Griffith, supra note 320, at 831 (quoting DOR Communications Manager Derrick Gasperini).

327 Griffith, supra note 320, at 831.

328 See supra text accompanying notes 239-240.

329 See I.R.C. § 6110(k)(3).

330 See infra text accompanying note 344.

331 See I.R.C. § 6110(c) (“Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete” items on a list that includes “names, addresses, and other identifying details” in (c)(1) and “trade secrets and commercial or financial information obtained from a person and privileged or confidential” in (c)(4)).
redact confidential taxpayer information from the rulings that it did publish, while retaining the legal analysis.\textsuperscript{332} As this suggests, confidential financial information that should be redacted may well be separable from the legal principles the IRS applies.

\begin{itemize}
  \item[a.] Disguising the Taxpayer’s Identity

  An IRS Chief Counsel raised in 1965 the deterrent effect on rulings applications if a “ruling, containing all the facts of the proposed transaction possibly a highly confidential business deal such as a merger of two listed companies were to be published by the Service before the transaction was consummated.”\textsuperscript{333} The Chief Counsel also raised the question of “[w]hat would happen if, after being made public, the proposed transaction were to be cancelled?”\textsuperscript{334} This could embarrass the taxpayer\textsuperscript{335} and potentially have deleterious economic consequences.\textsuperscript{336} Of course, publication of the ruling could be delayed until these issues were no longer raised. Moreover, the Chief Counsel’s questions seem to assume that those accessing the ruling would know the identity of the taxpayer and the counterparty, which should not be the case after redactions.

  Of course, the United States is large, so it may be easier to obscure the identity of a taxpayer than it would be in a smaller country. However, U.S. states, which are relatively small, have also confronted that issue.\textsuperscript{337} For example, the state of Kentucky was recently required to make its letter rulings public,\textsuperscript{338} and it addressed how to maintain taxpayer anonymity. In part, to facilitate redactions, it developed a new format for rulings, in which only the “legend,” which is not made public, contains the taxpayer’s identifying details.\textsuperscript{339} The taxpayer must also sign a waiver to receive the ruling.\textsuperscript{340}

  If a taxpayer reviews the document before signing the waiver and sees a piece of identifying information in the ruling that the taxpayer would not want published, the department will determine if the issue can be described in a

\end{itemize}

\begin{flushright}
\textsuperscript{332} Hearings, supra note 233, at 1564 (remarks of Mr. Sugarman) (“our first concern in approaching this matter of disseminating rulings, was the problem of being able to disseminate rulings and delete from them the type of confidential information which did not affect the principles involved.”).

\textsuperscript{333} Rogovin, supra note 27, at 767-68 n.60.

\textsuperscript{334} Id.

\textsuperscript{335} Oran, supra note 206, at 848 (“[T]he contemplated transaction might never occur and disclosure of the letter ruling request could prove embarrassing.”).

\textsuperscript{336} Cf. Blank, supra note 25, at 485 (describing a situation in which Yahoo Inc. announced a planned spin-off and that it would seek a letter ruling; the IRS soon announced that it would not rule on this type of spin-off; and “within minutes of the announcement from the IRS, the stock price of Yahoo plummeted by more than 10%.”).

\textsuperscript{337} See Griffith et al. Part 2, supra note 98, at 333 (“Approximately 45 states and the District of Columbia offer private letter rulings, and of those about 35 make them available for the public, typically by publishing a redacted version on the department of revenue's website.”).

\textsuperscript{338} Aaron Davis, DOR Looks to Revamp Letter Ruling Format, 94 TAX NOTES STATE 152, 152 (Oct. 14, 2019) (referencing the litigation).

\textsuperscript{339} Id.

\textsuperscript{340} Id. This is because “Kentucky statutes prevent the release of taxpayer information.” Id.
different way or given a pseudonym, [J. Todd] Renner [“the executive director of the department’s Office of Tax Policy and Regulation”] said.

“The goal is to maintain the confidentiality of the taxpayer,” he said.\(^{341}\)

Kentucky also addressed the issue of what to do if an industry in the state has only a few competitors:

For example, Renner said, there are only three automobile manufacturers in Kentucky, meaning that if a member of the public sees a ruling involving an automaker, he or she would know right away that it must refer to Ford Motor Co., Toyota Motor Corp. or General Motors Co. Thus, rulings will be evaluated and adjusted case by case to ensure that taxpayers are confident of their anonymity in the final document, he said.\(^{342}\)

There is no reason that such confidentiality can’t be paramount while still publishing rulings. In the automotive example, the taxpayer’s industry could be redacted, along with any other relevant details. Having some published rulings unclear as to the taxpayer’s industry still provides much greater transparency than blanket confidentiality of tax rulings.

b. Special Concerns in the APA Context

As U.S. practice reflects, disclosure of APAs often is considered to pose a greater risk of revelation of confidential taxpayer information than rulings do.\(^{343}\) For example, the OECD once stated:

Tax administrations also should ensure the confidentiality of trade secrets and other sensitive information and documentation submitted to them in the course of an APA proceeding. Domestic rules against disclosure should be applied where possible. In a bilateral APA the confidentiality requirements on treaty partners would apply, thereby preventing public disclosure of confidential data.\(^{344}\)

This reflects a prioritization of confidentiality, including urging application of “[d]omestic rules against disclosure.”\(^{345}\) However, the focus of the confidentiality concern is “trade secrets and


\(^{342}\) Id.

\(^{343}\) See Hickman, *supra* note 36, at 179 (“Because of the sensitivity of the information that must be disclosed to the IRS, participants in the advance pricing agreement program have expressed great concern for the confidentiality of that data.”).


\(^{345}\) Id.
other sensitive information and documentation” and “confidential data,” not legal analysis. Such confidential information could be redacted prior to publication.

Moreover, the OECD made that statement in 1995, a time when international norms called for much less transparency. The lack of transparency led to concerns about harmful tax practices and to leaks such as LuxLeaks. Since then, both international norms and the actual transparency of tax rulings have evolved. Not only have the OECD and European Commission required exchanges of summaries of many APAs, the OECD has required in BEPS Action 13 Country-by-Country (CbC) reporting, which includes transfer pricing documentation.

The action 13 BEPS report and the 2017 OECD guidelines call for a three-tiered approach to transfer pricing documentation:

• a master file covering the totality of a MNE’s operations and its transfer pricing policies;
• a local file providing information about the relevant related-party transactions and amounts involved at the local affiliate; and
• a new CbC template for reporting revenues, profits (or losses), taxes paid and accrued, assets, and employees in every country where the MNE operates.

The “CbC report is shared with tax administrations in these jurisdictions, for use in high level transfer pricing and BEPS risk assessments.” Of course, CbC reporting and exchanges of APAs with other countries are not the same as public disclosure of APAs. They provide some accountability in the APA process but not as much as disclosure of anonymized APAs would

A concern some may have regarding disclosed APAs is whether the redactions would be sufficient to protect confidential taxpayer information. For example, in the early 2000s, some companies expressed concern that the U.S. statutory scheme would be insufficient to protect confidential taxpayer information.

---

346 Id.
347 For example, in 2010, the Code of Conduct Group encouraged rulings transparency: “Where the advance interpretation or application of a legal provision to a specific situation or transaction of an individual taxpayer is suitable for horizontal application in similar situations, this interpretation or application should be published or be reflected in updated guidance, or be made otherwise publicly available.” Code of Conduct Group (Business Taxation) Report to the ECOFIN Council, Document 10033/10 FISC 47 at 11 (May 25, 2010), http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%202010%20033%202010%20INIT. That recommendation appears to have come from the European Commission. See Nouwen, supra note 290, at 141-42 (referring to the European Commission’s first draft of guidelines).
348 See Piergiorgio Valente, Advance Pricing Arrangements: Optimal Tool – Optimal Framework?, 48 INTERTAX 67, 69 (2020) (“[T]ransparency has been a key pillar of the entire BEPS Project, and the commitment to its enhancement shall also affect APAs.”).
349 Felgran & Hughes, supra note 145, at 960 (“Several BEPS reports are of particular interest: Action 5 is intended to counter harmful tax practices more effectively, actions 8-10 attempt to align transfer pricing outcomes with value creation, and action 13 covers transfer pricing documentation and country-by-country reporting.”).
350 Id. at 961.
However, this has not been a problem in the decades in which U.S. letter rulings have been published. It is also important to note that, unlike tax returns, APAs are not legally required. The taxpayer requests the APA. Taxpayer sign-off on the redacted version of the APA could be a condition of receiving one, along the lines of Kentucky’s approach. That would result both in taxpayer consent both to the disclosure and to the specific redactions.

It is possible that one or more countries involved in a bilateral or multilateral APA would have concerns about potential disclosures. However, even the countries involved could and should be anonymized, as has been done with published U.S. letter rulings involving transfer pricing issues. It would also be possible to give the tax administration of a country that is party to an APA that would be disclosed a statutory right to review proposed redactions and request additional anonymization. If necessary, publication could be limited to redacted unilateral APAs. For example, “[i]n 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.”

One response to the proposed publication of anonymized U.S. APAs is that a redacted APA would be unhelpful. For example, a former IRS Associate Chief Counsel (International) claimed that redacted APAs “‘would look like a piece of Swiss cheese’ and, therefore, would ‘not be very meaningful.’” These concerns have led some to suggest

352 STAFF OF J.T. COMM. ON TAXATION, 106TH CONG., supra note 108, at 34; Kaye, supra note 107, at 1194.

353 See Martin A. Sullivan, How To Decode APAs and Still Keep a Secret, 12 TAX NOTES INT’L 1250, 1255 (Sept. 18, 2000) (“Occasionally it has been suggested that if APAs were made public, sensitive taxpayer information, such as trade secrets, would be at risk of being revealed to competitors. Based on the record of disclosure to date, that notion is absurd.”)

354 Stark et al., supra note 45, at 1072.

355 Ring, supra note 41, at 192 (“In fact, the entire program has a strong element of taxpayer control and electivity because only the taxpayer can initiate the procedure.”).

356 See supra text accompanying notes 340-341.


359 Sheryl Stratton, Competing Interests Snag APA Program Guidance, 70 TAX NOTES 138, 138-39 (Jan. 8, 1996). Diane Ring argues that “To the extent their ‘Swiss cheese’ nature would render them less than illuminating, the Service could complement their content with more explanatory general
disclosure of something less than actual APAs. For example, BNA’s lawsuit sought only the transfer pricing methodologies approved by the tax administration.\(^{360}\) Lorraine Eden and William Byrnes recently advocated for another possibility: “Tax authorities should publish ‘best practice’ templates based on actual APA settlements, which can be suitably disguised to protect the given firm’s key information.”\(^{361}\) Although not as comprehensive of publication of all of a tax administration’s approved transfer pricing methodologies, such templates would at least be based on actual APAs. Eden and Byrnes also argue that, to increase transparency, “[t]ax authorities should also publish stylized case studies as best-practice templates that are made available on the tax authority website where they could be analyzed and adopted by other tax authorities and MNEs.”\(^{362}\)

However, the argument that redacted APAs would have so many holes in them as to be useless has been vigorously disputed. For example, Martin Sullivan argued:

In addition to methods and comparables, there is a lot of other useful guidance that could be provided on a case-by-case basis from APAs, such as compensating adjustments, critical assumptions, and adjustments made to comparables. As practitioners well know, all of those items play pivotal roles in APAs. In most cases they could be released to the public in redacted form without any threat to taxpayer privacy.\(^{363}\)

Joel Kuntz and Robert Peroni make a similar argument\(^{364}\) and also comment that “[m]ost of the taxpayers involved will be publicly traded corporations that already file volumes of information with the Securities and Exchange Commission.”\(^{365}\) Moreover, as Joshua Blank observed, “in 1999, when the IRS announced its decision to publish Advance Pricing Agreements, it embarked on the process of redacting all previously executed agreements, implying that publication with re-redaction is possible.”\(^{366}\) At that time, “then-Assistant Treasury Secretary Don Lubick stated that: ‘We at Treasury have confidence that, with respect to any given APA, if we put the taxpayer and the IRS in a room, an appropriately redacted APA could be agreed that would satisfy the public’s reasonable need to know.’”\(^{367}\)

---

\(^{360}\) See supra text accompanying notes 302-372.

\(^{361}\) Eden & Byrnes, supra note 52, at 26.

\(^{362}\) Id.

\(^{363}\) Sullivan, supra note 353, at 1254.

\(^{364}\) JOEL D. KUNTZ & ROBERT J. PERONI, U.S. INT’L TAXATION (Westlaw), at ¶ A3.11[13][c] (“The Service should be able to strip out enough information so that the taxpayer cannot be recognized, while still releasing a version that is meaningful to other taxpayers.”).

\(^{365}\) Id. at ¶ A3.11[13][c] (adding that “it seems ironic to withhold agreements from the public while some taxpayers proclaim to the tax press that they have obtained such agreements.”); see also McIntyre, supra note 301, at 1129 (“The only effective way to let interested parties know the legal standards governing the issuance of ADRs [(Advance Determination Rulings on transfer pricing)] is to make sanitized versions of the ADRs available to the public.”).

\(^{366}\) Blank, supra note 25, at 518.

\(^{367}\) Sullivan, supra note 353, at 1257.
Specific transfer pricing information is also discussed in the redacted versions of the European Commission’s State aid decisions. For example, the Commission’s Amazon decision summarizes the calculations made in Amazon’s transfer pricing report.\textsuperscript{368} And perhaps most telling, before the APA was developed, U.S. letter rulings containing transfer pricing determinations were published, with the redactions required by section 6110,\textsuperscript{369} without any apparent problem\textsuperscript{370} or lawsuit.\textsuperscript{371}

Of course, it is possible that the redacted APAs would contain less information than some would hope. However, having access to individual APAs, even heavily redacted, would provide much more transparency than (or in addition to) general statistics.\textsuperscript{372}

4. Expense of Publishing Rulings

Another objection to publishing rulings is potential increased cost to the government.\textsuperscript{373} In 1965, then-IRS Chief Counsel Mitchell Rogovin stated that “by creating a form of communication which was addressed to an individual taxpayer and concerned one particular transaction[,] . . . . “[r]esponsibility for issuing rulings . . . could be delegated to lesser


\textsuperscript{369} See, e.g., PLR 8122015 (Technical Advice Memorandum addressing issues such as “[d]o certain intangible differences between the Country A and the United States automobile markets have a ‘definite and reasonably ascertainable effect on price’ so that the comparable uncontrolled price method set forth in section 1.482-2(e)(2) of the Income Tax Regulations can be used to determine an arm’s length price for sales of automobiles by Corp B to Corp A?”); PLR 8002009 (addressing the issue of “[w]hether a portion of the sales prices received by Sub. 2B, a wholly owned domestic subsidiary of Corp. 1 qualifying under section 931 of the Internal Revenue Code of 1954, from foreign subsidiaries of Corp. 1 may be recharacterized as income attributable to intangibles and allocated to Corp. 1 under section 482.”).

\textsuperscript{370} Sullivan, supra note 353, at 1254 (“Perhaps the revelation of that type of sanitized information has bothered some taxpayer who has received a PLR, but no case (to the author’s knowledge) has ever been reported.”).

\textsuperscript{371} Code section 6110 provides a private right of action “[w]henever the Secretary … fails to make deletions required in accordance with subsection (c) . . . .” I.R.C. § 6110(j)(1)(A). The statute also includes a damages remedy for intentional or willful failure to make deletions. I.R.C. § 6110(j)(2). A search in Lexis turned up no cases alleging failure to make such deletions.

\textsuperscript{372} See McIntyre, supra note 301, at 1129 (“A need for some secrecy … does not justify total secrecy. Companies engaged in cross-border transactions ought to know the general guidelines that the IRS is following (implicitly or explicitly) in approving and disapproving the requests of their competitors for [APAs].”).

\textsuperscript{373} See Rick Handel, I Look at SALT From Both Sides Now: Departmental Transparency, 68 ST. TAX NOTES 477, 480 (2013) (“The major and most often given reason that departments provide less transparency than is ideal is lack of resources.”); Australian Inspector-General, supra note 243, at 4.73 (addressing the cost of Australia’s tax rulings register).
In the 1970s, Reid argued that “it must be acknowledged that the IRS would be likely to be more cautious in issuing rulings if it were aware of the possibility of public scrutiny. Therefore, a system of public access to IRS rulings would require the Service to commit additional resources to the review of rulings in order to avoid delay and would involve some increase in the cost of the rulings system . . . .”

However, nontransparent rulings also have costs, including (1) possibly duplicative work for the tax administration and (2) reduced tax compliance due to lack of guidance. In addition, the government can pass the cost of producing a ruling onto the taxpayer requesting it via ruling application fees. It is also possible that disclosure of rulings may reduce costs in the long run as some taxpayers and their advisers consult available rulings instead of directing individual questions to the tax authority.

5. Decline in Rulings Volume?

“The most serious objection to making all rulings public is that such a policy might dry up the rulings process . . . .” Reportedly, in the 1970s, “Lester Uretz . . . General Counsel of the IRS, maintain[ed] that publication of all [letter] rulings would cause ‘substantial delay in the ruling process .... [I]t would be necessary to delete identifying details from thousands of rulings.’” That appears to refer to an existing inventory of rulings upon publication, which is a transition issue. Prospectively, taxpayers can propose the deletions themselves.

Beyond a transition issue, a steep reduction in rulings could occur if taxpayers stop requesting them. Some decline in requests could be positive, in that it could reflect a decrease in requests for guidance where the tax administration has already issued similar rulings to other taxpayers. However, a complete halt to the guidance provided by rulings would not be positive. This could occur if taxpayers are deterred by the prospect of disclosure. Another

---

374 Rogovin, supra note 27, at 767. An unscientific look at several 1964 rulings on Lexis that contain the word “signed” finds rulings signed by officials with the following titles: “Director, Tax Rulings Division”; “Chief, Individual Income Tax Branch”; “Chief, Excise Tax Branch”; and “Chief, Reorganization Branch”; and ‘Chief, Employment Tax Branch.” A similar look at several rulings from the post-publication year 1977 finds rulings signed by “Chief, Rulings Section 1 Exempt Organizations Technical Branch”; “Chief, Individual Income Tax Branch”; “Chief, Wage, Excise and Administrative Provisions Branch”; and “Chief, Estate and Gift Tax Branch.”

375 Reid, supra note 88, at 36 (footnote omitted).

376 Australian Inspector-General, supra note 243, at 4.73.

377 Handel, supra note 373, at 480-81.

378 Reid, supra note 88, at 34.

379 Id. (quoting Letter from Assistant Commissioner Swartz to Senator Ribicoff, Aug. 15, 1971).

380 See id. (“To avoid the disclosure of confidential information, Mr. Rogovin [former Chief Counsel of the IRS] would require that the taxpayer himself prepare a ‘Bowdlerized’ version of the ruling with identifying details deleted … thus shifting the cost of excising such material to the party who benefits from it.”).

381 See Australian Inspector-General, supra note 243, at ¶ 4.60 (referring to efficiency gains).
possibility is that the tax administration would become more reluctant to issue rulings.  

Relatedly, the tax agency could take more time to issue rulings than it would if the rulings lacked outside scrutiny. However, the prospect of scrutiny is a strong argument in favor of disclosure because scrutiny gives rise to accountability. In addition, if publication deterred the issuance of rulings in the United States, one would expect fewer rulings to be issued by the IRS after its letter rulings were first published. Yet, that was not the case, as shown below.

The shift from a process of largely confidential IRS letter rulings to publication of anonymized versions of all of its letter rulings (and technical advice memoranda) occurred in 1976. The change does not seem to have been followed by a decline in letter ruling volume. First, requests for tax rulings and technical advice appear to have gradually increased during most of the decade after 1976, as the chart below showing IRS ruling-request closures reflects.

---

382 Reid, supra note 88, at 3 (describing in 1972 the argument that “the Service would be reluctant to rule in many situations if the rulings would have universal applicability.”).

383 Thompson, supra note 241, at 545 (“Longer ruling time was suggested by [IRS] Assistant Commissioner Gibbs in the context of a proposed ruling procedure requiring waiver of the taxpayer’s right to nondisclosure. A reduction in the number and scope of rulings and restriction of the circumstances in which ruling requests will be granted appears inevitable, absent an increase in Service staff, if the Service intends to provide proper review to assure absence of uneven treatment.”).

In 1965, then-IRS Chief Counsel Mitchell Rogovin wrote that “At present, response to most rulings is made within 90 days of receipt, a fact that is made possible only because most letter rulings are subject to limited review in the National Office.” Rogovin, supra note 27, at 767. Cf. Sugarman, supra note 29, at 38 (“some tax practitioners expressed the concern that the publication of rulings would tend to diminish the ruling letters issued by the Service, for the reason that officials of the Service would be less likely to ‘stick their necks out’ in ruling letters if they knew that they were required to be published.”).

384 This policy underlies the Freedom of Information Act in the United States. See DEA, Freedom of Information Act, https://www.dea.gov/freedom-information-act (“The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”).


“A technical advice memorandum is similar to a letter ruling but legally more sophisticated. It is not issued directly to a taxpayer; it is a response to a district director’s request for instructions as to the treatment of a specific set of facts relating to a named taxpayer.” Thompson, supra note 241, at 532.

386 The IRS table is called “Requests for Tax Rulings and Technical Advice (Closings)” for the years in the table. See, e.g., 1978 IRS ANN. REP. 48, https://www.irs.gov/pub/irs-soi/78dbfullar.pdf. The figures reported do not include the numbers for “Field Requests,” only “Taxpayers’ Requests.”

**IRS-Reported Number of Taxpayer Requests for Tax Rulings and Technical Advice Closed, 1974-1988**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Taxpayer Ruling Requests</th>
<th>Year</th>
<th>Number of Taxpayer Ruling Requests</th>
<th>Year</th>
<th>Number of Taxpayer Ruling Requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>~27,327<strong>388</strong></td>
<td>1979</td>
<td>26,585</td>
<td>1984</td>
<td>34,246</td>
</tr>
<tr>
<td>1976</td>
<td>26,080</td>
<td>1981</td>
<td>30,745</td>
<td>1986</td>
<td>Approx. 22,500<strong>389</strong></td>
</tr>
<tr>
<td>1977</td>
<td>Not specified<strong>390</strong></td>
<td>1982</td>
<td>31,726</td>
<td>1987</td>
<td>22,165</td>
</tr>
<tr>
<td>1978</td>
<td>24,705</td>
<td>1983</td>
<td>34,399</td>
<td>1988</td>
<td>24,699</td>
</tr>
</tbody>
</table>

Second, the volume of tax rulings that the IRS issued and published also increased after 1976. It began declining years later, in 1983. A December 1987 legislative change authorized the IRS to charge a user fee for ruling requests, so the decline predated the fee.

---


388 The IRS report for this year provides the figure of 14,017. However, the IRS chart does not include the category of applications from taxpayers for permission to change accounting period or method, which usually is included. The report adds that “[i]n addition, the Service Processed 14,329 applications taxpayer for permission to change their accounting period or method and made 932 earnings and profits determinations.” See 1974 IRS ANN. REP. 30, https://www.irs.gov/pub/irs-soi/74dbfullar.pdf. In addition, it includes “Actuarial Matters,” see id., which usually are not included in this chart. The figure in the chart in this Article adds the 14,329 to the 14,017 and subtracts 1,019 for actuarial matters.

389 This figure is not reported in a table. See 1986 IRS ANN. REP. 140 Tbl. 31, https://www.irs.gov/pub/irs-soi/86dbfullar.pdf. It is not broken out between taxpayer and field requests, so it likely includes some field requests, unlike the other figures in the table. It may also be rounded.

390 The report for this year includes the figure of 10,329. However, the list of topics covered in that year’s chart only includes actuarial matters, exempt organizations, and employee plans. See 1977 IRS ANN. REP. 140 Tbl. 18, https://www.irs.gov/pub/irs-soi/77dbfullar.pdf. That is the list of categories usually included in the chart titled “Requests for EP/EO [Employee Plan/Exempt Organization] tax rulings and technical advice (closings).” See, e.g., 1987 IRS ANN. REP. 60 Tbl. 17, https://www.irs.gov/pub/irs-soi/87dbfullar.pdf. Usually, the charts omit those categories but include more categories in total. For example, the 1976 chart includes 11 other categories. See 1978 IRS ANN. REP. 41, https://www.irs.gov/pub/irs-soi/76dbfullar.pdf. Similarly, the 1978 chart includes 10 other categories. See 1978 IRS ANN. REP. 41, https://www.irs.gov/pub/irs-soi/78dbfullar.pdf. The single largest category in the 1976 and 1978 years is “Changes in Accounting Periods,” which exceeds 10,000 requests each year for those two years. The second largest is “Changes in Accounting Methods,” which exceeded 6,000 requests each year.

391 Not all ruling requests result in published rulings. The taxpayer may withdraw the request, perhaps to avoid an adverse ruling, see Sugarman, supra note 29, at 25, or the IRS may decline to rule, see Rev. Proc. 2020-1, 2020-1 I.R.B. 1 § 6.02 (“[T]he Service may decline to issue a letter ruling … when appropriate in the interest of sound tax administration, including due to resource constraints, or on other grounds whenever warranted by the facts or circumstances of a particular case.”).
## Number of PLRs Issued by the IRS per Year 1972-2019

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of PLRs</th>
<th>Year</th>
<th>Number of PLRs</th>
<th>Year</th>
<th>Number of PLRs</th>
<th>Year</th>
<th>Number of PLRs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>564 found</td>
<td>1984</td>
<td>5,402</td>
<td>1996</td>
<td>1,941</td>
<td>2008</td>
<td>1,962</td>
</tr>
<tr>
<td>1974</td>
<td>396 found</td>
<td>1986</td>
<td>4,450</td>
<td>1998</td>
<td>2,143</td>
<td>2010</td>
<td>1,741</td>
</tr>
<tr>
<td>1975</td>
<td>399 found</td>
<td>1987</td>
<td>3,932</td>
<td>1999</td>
<td>2,055</td>
<td>2011</td>
<td>1,489</td>
</tr>
<tr>
<td>1976</td>
<td>349 found</td>
<td>1988</td>
<td>3,820</td>
<td>2000</td>
<td>1,973</td>
<td>2012</td>
<td>1,351</td>
</tr>
<tr>
<td>1977</td>
<td>3,287</td>
<td>1989</td>
<td>3,920</td>
<td>2001</td>
<td>1,999</td>
<td>2013</td>
<td>1,217</td>
</tr>
<tr>
<td>1978</td>
<td>4,457</td>
<td>1990</td>
<td>3,193</td>
<td>2002</td>
<td>2,068</td>
<td>2014</td>
<td>1,563</td>
</tr>
<tr>
<td>1979</td>
<td>5,120</td>
<td>1991</td>
<td>2,344</td>
<td>2003</td>
<td>1,710</td>
<td>2015</td>
<td>1,075</td>
</tr>
<tr>
<td>1980</td>
<td>5,645</td>
<td>1992</td>
<td>2,172</td>
<td>2004</td>
<td>1,758</td>
<td>2016</td>
<td>1,063</td>
</tr>
<tr>
<td>1981</td>
<td>5,782</td>
<td>1993</td>
<td>2,176</td>
<td>2005</td>
<td>1,650</td>
<td>2017</td>
<td>953</td>
</tr>
<tr>
<td>1982</td>
<td>5,735</td>
<td>1994</td>
<td>2,076</td>
<td>2006</td>
<td>1,909</td>
<td>2018</td>
<td>836</td>
</tr>
<tr>
<td>1983</td>
<td>5,610</td>
<td>1995</td>
<td>1,957</td>
<td>2007</td>
<td>1,467</td>
<td>2019</td>
<td>815</td>
</tr>
</tbody>
</table>

---

392 Rev. Proc. 1988-8, 1988-1 C.B. 628 (citing Revenue Act of 1987, Pub. L. 100-203 § 10511 (Dec. 22, 1987)). In 1988, the default ruling fee was $300 and the highest fee was $1,000. Id. at § 4.03. The default fee remained at that level for a couple of years. See Rev. Proc. 1989-1, 1989-1 C.B. 740 § 8.03. In 1990, the IRS increased fees, including raising the default to $2,500, but it also introduced lower fees for lower-income individuals, trusts, and estates. See Rev. Proc. 90-17, 1990-1 C.B. 479 § 6.03(1).

393 The rulings figures in the table were found replicating as closely as possible the methodology in Givati, supra note 41, at 151 fig. 3 (“Search Lexis-Nexis IRS Private Letter Rulings and Technical Advice Memoranda database for ‘private letter ruling and not (technical advice memorandum)’.”) Givati provides specific figures for 1981, 1989, 1991, and 2007. Where specific figures in the table in the text differ from figures reported in Givati’s article or other sources, the other figures are cited in footnotes.

394 1976 is the year in which letter rulings were first made public en masse. See I.R.C. § 6110(h) (“Disclosure of prior [pre-November 1976] written determinations and related background file documents”). The Joint Committee report accompanying the legislation provided ordering rules. See STAFF OF JOINT COMMITTEE ON TAX’N, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 309-310 (Joint Comm. Print 1976). In 1979, the IRS stated, “Some 25,000 of the approximately 83,000 issued in answer to [ruling and technical advice] requests made before Nov, 1, 1976, were made available to the public in 1978. During 1979, the remaining 58,000 determinations written in the past were made available to the public, marking the end of the past rulings release program.” 1979 IRS ANN. REP. 32, https://www.irs.gov/pub/irs-soi/79dbfullar.pdf. However, the Joint Committee report cited above refers to “making prior determinations open to public inspection” (emphasis added), so many of the documents may not have been published anywhere.

395 An article using the Tax Notes database reports slightly different PLR figures for 1980 through 2003. See Judy Parvez & Sheryl Stratton, IRS Guidance 1980-2003: An Ever-Changing Landscape, 105 TAX NOTES 985, 987 Tbl. 2 (Nov. 2004) (reporting as follows: 5,526 (1980); 5,789 (1981); 5,791 (1982); 5,735 (1983); 5,474 (1984); 5,200 (1985); 4,514 (1986); 3,940 (1987); 3,965 (1988); 3,958 (1989); 3,418 (1990); 2,537 (1991); 2,217 (1992); 2,174 (1993); 2,026 (1994); 2,005 (1995); 1,986 (1996); 1,946 (1997); 2,041 (1998); 2,018 (1999); 1,978 (2000); 2,028 (2001); 2,064 (2002); 1,805 (2003)).

396 The figure reported in Givati for 2007 is 1,436. See Givati, supra note 34, at 151 fig. 3.
Thus, publication did not end the IRS’s letter rulings program, nor did it seem to significantly decrease it. It is also worth noting that when the IRS announced in January 1999 that it would disclose APAs, it found that the announcement “had little impact on the APA program.”397 In fact, year-over-year, APA applications and pending APA requests increased slightly.398

Luxembourg’s situation is different. It is true that its rulings volume has dropped.399 For example, Luxembourg’s tax administration reports a progressive decline in advance tax rulings between 2015 and 2018 from 539 to 142, and in APAs from 187 to 6.400 However, this is part of a longer trend line that predates exchanges of ruling summaries with other countries. The European Commission’s Joint Transfer Pricing Forum Statistics show a steady decline in Luxembourg’s APAs over a longer period of time, with 2014 representing the high point:401

---

397 BNA President’s Letter to Archer on Public Access to APAs (May 12, 1999), 1999 TNT 96-21 (emphasis removed).
398 Id. The announced release of APAs did not end up taking place. See supra text accompanying notes 108-114.
399 2019 OECD statistics show the following figures for Luxembourg’s rulings exchanged:

<table>
<thead>
<tr>
<th>Time Period</th>
<th>Number of Rulings Exchanged</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan. 1, 2010 to Mar. 31, 2016</td>
<td>1,922</td>
</tr>
<tr>
<td>Apr. 1 to Dec. 31, 2016</td>
<td>73</td>
</tr>
<tr>
<td>2017</td>
<td>18</td>
</tr>
<tr>
<td>2018</td>
<td>9</td>
</tr>
</tbody>
</table>

OECD, 2019, supra note 282, at 263. The 2017 OECD report lists the number of past rulings as 5,600. See OECD, 2017, supra note 271, at 189, 916. “Past rulings” are qualifying rulings issued between January 1, 2010 and March 31, 2016. See supra note 281 and accompanying text. Annualized, the 5,600 past-ruling figure reflects an average of approximately 1,066 rulings per year (calculation by the author using a 63-month period). However, the figures may have varied over that time.


The total number of APAs the ACD reported for 2016 is 118. The OECD reported 219 rulings for 9 months of 2016, so the 2016 figure must include other rulings.

Thus, it appears likely that exchange of tax ruling information with other countries did not drive a dramatic decrease in the number of rulings Luxembourg issued. It is also worth emphasizing that these statistics do not provide insight into the effect of the publication of rulings. Although a subset of old rulings were revealed by LuxLeaks in 2014, Luxembourg still does not publish its tax rulings, so this does not show an effect of switching to prospective disclosure. Moreover, Luxembourg experienced numerous other changes beginning in 2015.

Starting on January 1, 2015, Luxembourg’s process is more formal and takes longer. It also newly requires payment to the ACD of a fee of up to 10,000 Euros. In addition, published figures show that, beginning in 2015, Luxembourg rejected an increasing percentage of ruling requests. While European Commission figures show that Luxembourg rejected no APA requests in 2012 and 2013 and only 10 in 2014, in 2019, Luxembourg rejected a quarter of letter ruling requests and a supermajority of APAs.


**See supra text accompanying note 321.**
<table>
<thead>
<tr>
<th></th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>454</td>
<td>145</td>
<td>390</td>
<td>91</td>
<td>204</td>
</tr>
<tr>
<td>Unfavorable</td>
<td>85</td>
<td>42</td>
<td>62</td>
<td>27</td>
<td>27</td>
</tr>
<tr>
<td>TOTAL</td>
<td>539</td>
<td>187</td>
<td>452</td>
<td>118</td>
<td>231</td>
</tr>
<tr>
<td>Percent Unfavorable</td>
<td>15.77%</td>
<td>22.46%</td>
<td>13.71%</td>
<td>22.88%</td>
<td>11.69%</td>
</tr>
</tbody>
</table>

The high rate of rejection removes some of the certainty of the previous regime, and yet there are increased access costs. In addition, in recent years, the presence of a ruling may be perceived as increasing the risk of a State aid investigation, which reduces certainty and is an additional deterrent to ruling requests.\(^{407}\) It is also worth noting that, at the time it formalized its rulings process, the Luxembourg tax administration stated that it would increase its published guidance (tax circulars) so as to reduce the need for rulings.\(^{408}\)

The tax administration ultimately controls the volume of rulings it issues, though taxpayer demand affects the numbers, as well. But the U.S. and Luxembourg examples do not raise a concern that publication of rulings will call a halt to the rulings process. Luxembourg has not published its rulings, so its data is not relevant on that question. The United States has published its letter rulings, and rulings volume actually increased after that. So, this asserted cost of rulings publication should not carry much weight, at least in countries with strong protections of confidential taxpayer information akin to the U.S. federal regime.\(^{409}\)

---

\(^{407}\) See supra note 146 and accompanying text.

\(^{408}\) *Luxembourg Ministry of Finance Position Paper*, supra note 7, at 3 (“The administration will issue further circulars on the interpretation and application of certain provisions and issues of the tax law which are frequently raised by individual tax payers in their respective ruling requests, thus limiting the need to revert to rulings with regard to those provisions and issues.”).

\(^{409}\) See generally I.R.C. §§ 6103, 6110, 7431 (providing for protection of confidential taxpayer information and civil remedies for violations); Tax Executives Institute, *Confidentiality of Tax Return Information*, 51 TAX EXEC. 365, 365 (1999) (“Even before section 6103 was enacted … the preservation of taxpayer confidentiality was a core value of the American tax system.”).
CONCLUSION

Transparency in the law is very helpful for those subject to the law. In 2012, “[s]everal practitioners that spoke with Tax Analysts said that taxpayers crave certainty. They want to know both what the law is and how to follow it, and be comfortable that the law will be consistently enforced. Transparency ensures all three of those things.”\(^{410}\) When letter rulings are not accessible, the tax administration’s view of the law is not clear to taxpayers.

Transparency is also an important value because it facilitates accountability.\(^{411}\) Accountability matters because people care whether government institutions act responsibly.\(^{412}\) They may also care about whether other taxpayers are complying with their obligations because if some taxpayers pay less, others will have to pay more in order for the government to meet its revenue target.\(^{413}\) The perception that others are cheating may also give some taxpayers a rationalization to justify engaging in evasion themselves.\(^{414}\) Put another way, it is not appealing to feel like a “chump” who pays in full while others free ride.\(^{415}\)

“In the end, transparency creates a better tax system by creating the certainty that taxpayers crave and enabling a more informed debate about what constitutes fair tax administration.”\(^{416}\) Disclosure of anonymized tax rulings and APAs would help eliminate the risks that countries, tax advisers, and taxpayers face in nontransparent rulings regimes.\(^{417}\) The

---

\(^{410}\) Griffith et al. Part I, supra note 98, at 189.

\(^{411}\) See Blank, supra note 25, at 459 (“Transparency generally serves two functions, which apply equally in the context of tax administration: democratic governance and accountability.”); Tal Z. Zarsky, Transparent Predictions, 2013 U. ILL. L. REV. 1503, 1533-34 (“Transparency is an essential tool for facilitating accountability because it subjects politicians and bureaucrats to the public spotlight. Yet, it is merely one of the strategies that could be applied to achieve the accountability objective.”).

\(^{412}\) Zarsky, supra note 411, at 1533 (“Accountability refers to the ethical obligation of individuals (in this case, governmental officials) to answer for their actions, possible failings, and wrongdoings.”); id. at 1534 (“The fear that a broad segment of the public will learn of the bureaucrats’ missteps will deter these decision makers from initially engaging in problematic conduct.”).

\(^{413}\) See Danshera Cords, Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs, 2005 BYU L. REV. 1515, 1517 (2005) (“Compliance is important because when individuals and businesses fail to pay their taxes when due, compliant taxpayers must bear more than their fair share of the costs of government services.”).

\(^{414}\) See Leandra Lederman, The Fraud Triangle and Tax Evasion, 106 IOWA L. REV. __ (forthcoming 2021), Research Paper No. 398, at 48 (2019), https://ssrn.com/abstract=3339558 (“Community norms of compliance may make it harder for a taxpayer to justify evasion on the basis of bandwagon-type rationalizations such as ‘everyone does it’ or neutralizations such as ‘it’s not really wrong.’ By contrast, norms of noncompliance may facilitate rationalizations that the violation is not really a crime, or not so bad, or required so as not to be the only chump paying full freight.”).

\(^{415}\) See Richard C. Stark, A Principled Approach to Collection and Accuracy-Related Penalties, 91 TAX NOTES 115, 123 (2001) (“The compliant taxpayer does not want to be the only chump paying full freight.”).

\(^{416}\) Griffith et al. Part I, supra note 98, at 192.

\(^{417}\) See supra Part III.A.
main counterargument is that disclosure may also incur costs. However, those costs are limited and sometimes overstated, as this Article has shown.\textsuperscript{418}

The U.S. experience with IRS publication of letter rulings in anonymized form provides evidence that publication of non-APA tax rulings need not occasion the demise of the rulings program. It also reflects an evolution over time towards more transparent practices. Transparency should be considered a best practice that even countries with a strong culture of taxpayer confidentiality—which the United States has—should adopt.\textsuperscript{419} The United States should publish redacted APAs, or something as close to that as politically possible. In Luxembourg, the volume of rulings may be so low currently that publishing prospective rulings (in anonymized form, redacted as much as necessary) may not be of significant value, at least at present. However, announcing a policy of doing so would provide a highly positive signal, especially in the post-LuxLeaks era. As Maartin Ellis wrote in 1999 in a General Report to the International Fiscal Association on the topic of “Advance Rulings,” “many of the advantages to be realised by the existence of a well-structured rulings system can only be realised if the rulings are made available to the public.”\textsuperscript{420}

\textsuperscript{418} See supra Part III.B.

\textsuperscript{419} See Waerzeggers & Hillier, supra note 234, at 8 (“While not universal, the practice of publishing private rulings in redacted form subsequent to issuance is considered best practice to promote greater transparency and to further support the general objectives of certainty and consistency of the ruling system as a whole.”).

\textsuperscript{420} Ellis, supra note 31, at 50 (adding, “[i]n the countries that do this, protection of taxpayer privacy is not a major problem.”).