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INTRODUCING AN ADVANCE TAX RULING (ATR) REGIME

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INTRODUCING AN ADVANCE TAX RULING (ATR) REGIME

DESIGN CONSIDERATIONS FOR ACHIEVING CERTAINTY AND TRANSPARENCY

I. OVERVIEW

Advance tax rulings are a common feature of mature tax systems. The tax systems of the United States, the United Kingdom, the Netherlands, Germany, Australia, and South Africa all have established ruling practices. Taxpayers can obtain an advance tax ruling in nearly all OECD member countries.[1] Increasingly, many non-OECD countries are also offering advance tax rulings.

An advance tax ruling regime seeks to promote clarity and consistency regarding the application of the tax law for both taxpayers and the tax authority. However, there are also inherent risks associated with the proliferation of granting confidential advance tax rulings which are not published or otherwise reported.

This note focuses on designing an advance tax rulings regime in the nature of private tax rulings. A private tax ruling consists of advice that a taxpayer may seek from the tax authority in relation to the application of the tax law to their particular arrangement.[2] The ruling typically binds the tax authority in relation to the arrangement for which it is issued. As such, the taxpayer will ordinarily be protected from additional tax, penalties and interest when relying on the ruling issued. The benefit of a private tax ruling is typically personal to the taxpayer to whom that ruling is issued and is not binding on the tax authority as against other taxpayers, even if the same or similar circumstances exist.

Private tax rulings (or letter rulings, each of which represent the commonly understood notion of an advance tax ruling) should be contrasted with public tax rulings, which are more closely aligned with published interpretative notes or public administrative guidance. A public ruling is a written opinion by the tax authority dealing with the way in which the tax law applies to taxpayers, or a class of taxpayers, generally.[3] A public ruling is made publically available in full and can be used as a primary means of publishing and disseminating advice on the tax authority's interpretation of the tax laws they administer. These instruments also serve important functions in tax law administration, particularly where they provide guidance with respect to the exercise of discretionary powers contained in a tax law. Public rulings may or may not have legally binding force per se but may, at the very least, create legitimate expectations for taxpayers under general principles of administrative law.

Despite some level of commonality public rulings typically do not give rise to the same level of complexities and sensitivities as private rulings. This is primarily because public rulings are by nature public, are of general application and typically do not have the same legally binding effect as against individual taxpayers.

[1] See the table in Appendix A prepared by the OECD containing comparative information on selected features of various international revenue rulings systems.

[2] The OECD's Glossary of Tax Terms defines advance rulings broadly as "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"; see http://www.oecd.int/ctp/glossaryoftaxterms.htm#A.

[3] Class or product rulings that certain countries like Australia issue are thus a subset of public rulings as they set out how the tax law applies to a particular class of taxpayers or a particular type of investment arrangement.

II. EXECUTIVE SUMMARY

A private advance tax ruling regime should be established and maintained within a legal framework which contains specific provisions or rules governing the operation of that regime. The process of applying for, and subsequently obtaining, a private tax ruling should ordinarily be of a more formal nature. A typical process would consist of a number of steps commencing with the preparation and filing by the taxpayer of an application for an advance tax ruling and concluding with the issuance of that ruling in writing by the tax authority.

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. The published content of the ruling is typically edited to remove any content—such as names, description of unique transactions or dealings etc—which could identify the taxpayer to whom the relevant ruling has been issued. Many jurisdictions have considered that the benefits of broader publication outweigh the costs (and other potential disadvantages) associated with such publication.[4]

Some other key legal design considerations relating to the establishment of an advance tax ruling regime can be summarized as follows:

- **Scope of the regime.** An advance tax ruling system can be designed so that a ruling can be issued with respect to any issue involved in the application of the tax law, including issues relating to liability, administration and ultimate conclusions of fact. Further, an advance tax ruling system can be designed so that a ruling can be issued in relation to a transaction currently being considered but not yet undertaken, as well as to a transaction which has been undertaken but in respect of which a tax return has not yet been filed. However, it is typical to adopt some limitations (discussed further below).

- **Identification of issuing authority.** Commonly, private tax rulings are issued by a specialized and centralized unit of the tax authority.

- **Binding force and precedential effect.** A private tax ruling should take the form of legally binding advice which a taxpayer may seek from the tax authority. The ruling typically binds the tax authority such that the taxpayer will ordinarily be protected from additional tax, penalties and interest when relying on the ruling issued. However, the benefit of a private tax ruling should ordinarily be personal to the taxpayer to whom the ruling is issued.

- **Subject to administrative and/or judicial review.** It would need to be determined whether the decision by the tax authority in a ruling should be made subject to administrative and/or judicial review. While different jurisdictions have differing practices in this regard, it could be appropriate not to make the decision by the tax authority reviewable in circumstances where the ruling is binding on the tax authority but *not* the taxpayer. This is because, even in systems where adverse private tax rulings cannot be appealed directly, the taxpayer will be able to appeal the assessment made in accordance with the adverse ruling if the taxpayer proceeds with the transaction despite the adverse ruling.

- **Cost-recovery fee structures.** There are divergent international practices with respect to the charging of a fee for advance tax rulings, with a number of arguments for and against adopting a fee based structure discussed further in Section IV under F. below. Appendix A has comparative information relating to various international revenue rulings systems where the issue of private rulings is subject to fees.

A sample set of provisions establishing an advance tax rulings regime is set out at Appendix B. The provisions set out at Appendix B are general in nature and in the form of simplified sample legal provisions. Importantly, they do not take into account the individual circumstances of any particular tax system. The ultimate legal framework for the introduction or codification of an advance tax ruling regime in any given country would need to take into account the specific legal tradition and system, as well as the political and administrative structure and fiscal policies of the country concerned. Further, the more detailed procedural rules need not be reflected in the overarching law but could form part of any underlying regulations or interpretative or guidance notes. The overarching legal framework may merely operate to support the power of the

[4] See, for instance, discussion in the report of the Joint Committee of Taxation of the US Congress on the proposals that led to the publication of private letter rulings in the US: Joint Committee on Internal Revenue Taxation, *Private letter rulings*, September 24, 1975, available online here: https://www.jct.gov/publications.html?func=startdown&id=4033.

tax authority to issue the rulings and codify the key features of the advance ruling regime being established.

When establishing an advance tax ruling regime for the first time, the following considerations should be carefully considered by the authorities so as to not adversely impact on its own existing capacity and resources which could undermine the service and quality expectations of taxpayers with respect to the introduction and operation of the regime itself:

- Consider limiting the regime to proposed, immediately executable, complex and more significant transactions which are under very serious contemplation by taxpayers;
- Only consider expanding the scope of the ruling regime (e.g. to transactions which have been undertaken but in respect of which a tax return has not yet been filed) as the tax authority gains more experience with advance rulings;
- The ruling should be binding on the tax authority as against the taxpayer to whom the ruling is issued;
- The ruling should not be binding on the taxpayer, in which case the ruling itself need not be subject to administrative or judicial review; and
- Consider publishing edited versions of private advance rulings issued. This is best practice from a transparency perspective (as noted above, and discussed further below).

The remainder of this note is organized as follows: Section III sets out the case for and against a private rulings practice. Section IV sets out best practice design features of a rulings system.

III. THE CASE FOR AND AGAINST PRIVATE RULINGS

A. Arguments in favor of a private ruling practice

The advantages of a private tax ruling practice include:

- **Promotion of clarity and consistency regarding the application of the tax law for both taxpayers and the tax authority.** An advance tax rulings system creates a body of individual decisions which should enable the tax law to be applied consistently to taxpayers in the same or similar circumstances. This is consistent with a taxpayer's legitimate expectation that they be taxed appropriately and in accordance with the law. This is, in turn, consistent with general principles of good administration and the rule of law itself.
- **Enhancement of certainty of tax treatment of transactions and dealings, thereby also increasing taxpayer/investor confidence in the tax system.** Importantly, a ruling is only typically issued in the context of a proposed transaction in circumstances where that transaction will be entered into in the near future or is under very serious contemplation by the taxpayer. The rulings process should not be designed to respond to a taxpayer's general tax queries relating to their general affairs, or to speculative transactions, for which tax authorities typically have other programs and facilities.
- **Fostering compliance with the tax law to ensure the proper functioning of a self-assessment system.** Knowledge of an unfavorable ruling, or favorable ruling issued on a limited basis, can deter taxpayers from entering into particular arrangements. Further, the process can alert tax practitioners and tax authorities to tax issues which have not previously been considered.
- **Strengthening of relationships between taxpayers and the tax authority**, with enhanced cooperation leading to a more efficient tax system. In this respect a rulings practice is a corollary of, and a compliment to, cooperative compliance programs.[5]
- **Reduction in conflict**, on the basis that advance tax rulings can be used as a means to resolve tax technical issues before a formal dispute arises—although rulings may themselves be appealable in the same way as any other tax assessment or decision by the tax authority.[6]

[5] See OECD, *Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance*, OECD 2013.

[6] Even in systems where adverse private tax rulings cannot be appealed directly, the taxpayer will be able to appeal the assessment made in accordance with the adverse ruling if the taxpayer proceeds with the transaction despite the adverse ruling.

B. Arguments against a private ruling practice

The disadvantages of a private tax ruling practice include:

- **Risk of base erosion where incorrect or inappropriate rulings are issued or published.**[7] This is because an incorrect ruling can give rise to a loss in tax revenue. However, the revenue risk is limited by design in that the application of an advance tax ruling is confined to the taxpayer to whom it was issued. Furthermore, an advance ruling system may alert tax authorities to potential structural weaknesses in the tax legal framework.

- **The system can lead to 'privatization' of the tax law.** This is particularly the case where the ruling regime is used as a means of attracting tax base from other jurisdictions. This is also of concern where there is a substantial cost associated with applying for an advance tax ruling (e.g. because of very detailed application and supporting information requirements), and/or private rulings are not made public. A high relative cost also undermines the objective of providing equal access to the advance tax ruling system, particularly for taxpayers with limited resources.[8] It could also potentially undermine the neutrality and independence of the rulings process and outcome. Some jurisdictions do not charge a fee or any time-based charge (e.g. the Netherlands, Australia, Belgium). Similar concerns may arise where the law is uncertain or unsettled so that a private ruling issued in such context may amount to private or administrative lawmaking.[9] This aspect of rulings has also given rise to State Aid concerns in Europe[10], which resulted in the European Commission concluding that certain tax rulings that were issued by various tax authorities conferred selective tax advantages on particular taxpayers.

- **The system can be costly to administer**, as compared to where no such system exists. Consequently, a country may need to focus on other critical tax reform priorities before seeking to introduce an advance tax ruling regime. This is often the case for developing countries. However, in those countries where the capacity to properly administer the advance tax ruling system exists, the additional costs of administration should be offset by the ultimate benefits and advantages produced from maintaining an efficient and effective system. Some countries (e.g. Canada) have chosen to charge a time-based fee to address this concern.

- **The process can take too long for a ruling to be issued or published**, particularly in complex and/or significant matters. Lengthy delays may undermine one of the key objectives of the advance tax rulings system, which is to provide taxpayers with certainty of tax treatment in the context of their particular transaction or dealing on a timely basis.

[7] While formally private rulings do not have precedential value beyond the taxpayer and the arrangement concerned, in practice they do have a wider precedential effect even if they are not published; see below.

[8] Furthermore, to the extent that private rulings are published—albeit in a redacted form—the benefit of certainty and clarity they provide can be said to accrue at least to some extent to all taxpayers in the same or similar situation.

[9] Again, this concern is mitigated by publishing rulings. Furthermore, even in the absence of a ruling practice tax authorities are constantly asked to take a position in the context of their audit and assessment activities, including in circumstances where the law is uncertain or unsettled. In fact, a ruling practice may reveal such uncertainties earlier on, allowing early intervention by the lawmaker where necessary or appropriate.

[10] See Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules, IP/15/5880; State aid: Commission concludes Belgian "Excess Profit" tax scheme illegal; around €700 million to be recovered from 35 multinational companies, IP/16/42. Investigations are still ongoing in relation to Amazon and McDonald's in Luxembourg and Apple in Ireland; see State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg), IP/14/663; State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg, IP/14/1105; State aid: Commission opens formal investigation into Luxembourg's tax treatment of McDonald's, IP/15/6221.

IV. BEST PRACTICE DESIGN FEATURES

A. Procedural aspects

A private advance tax ruling regime should be established and maintained within a legal framework which contains specific provisions or rules governing the operation of that regime. A sample set of provisions establishing an advance tax rulings regime is set out at Appendix B. A private ruling procedure typically involves the following steps:[11]

- **Preparation and filing of application.** The application can take a prescribed form or can be made in another written form (e.g. by way of letter application). The application would typically include a detailed description of the transaction or scheme, together with detailed submissions in relation to the suggested application of the relevant tax law to that transaction or scheme, as well as all supporting documentation.

- **Timing of filing an application**, (say 30 to 40 days) before the date of the proposed transaction for which an advance tax ruling is sought (to enable the tax authority to deliver the ruling in a time frame that is of use to the taxpayer).

- **Review of application.** The application will typically be assigned to a case officer for review.

- **Notice of acceptance.** The case officer will notify the taxpayer whether the application meets the prescribed requirements and will issue an individual case number (internal reference) to the extent not previously issued (e.g. at the time of filing the application).

- **Substantive review.** The case officer will proceed with the detailed review and consideration of the application. During this process, the case officer may request additional information or clarification in relation to the application. The ruling application should go through an appropriate internal review process (e.g. two level review process) before making a decision to grant a ruling.

- **Notice of proposed ruling.** Following the completion of the review process, the taxpayer will be notified of the proposed outcome of the ruling (i.e. favorable or unfavorable):

  - If the proposed ruling is favorable, then the taxpayer will be provided with a draft ruling which it must carefully review, particularly the description of the underlying facts and arrangement to which the ruling will only apply;

  - If the proposed ruling is unfavorable, then the taxpayer may be given an opportunity to make further submissions or modify the application to correct a deficiency in their proposal.

- **Issuance and publication of ruling.** 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 (discussed further below). The published content of the ruling is typically edited to remove any content—such as names, description of unique transactions or dealings etc.—which could identify the taxpayer to whom the relevant ruling has been issued. The published ruling should provide a general summary of the transaction or scheme, the conclusion (with reasons) as to the application of the tax law to that transaction or scheme, and the period over which the ruling applies. As noted above, many jurisdictions have considered that the benefits of broader publication outweigh the costs (and other potential disadvantages) associated with such publication.

B. Scope

Advance tax ruling systems can be designed so that a ruling can be issued with respect to any issue involved in the application of the tax law, including issues relating to liability, administration and ultimate conclusions of fact. For example, the design of Australia's private rulings system allows private rulings to cover a very broad range of tax related issues, including conclusions of fact (such as tax residency status or whether the taxpayer is carrying on a business) and the application of Australia's general anti-avoidance rule.

In contrast, the design of South Africa's advance tax rulings systems has specific exclusions and grounds for refusal, including where the relevant issue is of a factual nature. This is on the basis that the system is designed to provide taxpayers with certainty with respect to questions of tax law rather than as a means for resolving questions of

[11] While not all the features discussed here are necessarily regulated in a country's formal ruling procedure, they are common. For instance, while the Belgian private ruling regime does not stipulate that the tax authority must notify the applicant of an impending positive or negative decision, this is *de facto* what happens through an informal 'pre-filing' phase; see Belgian Court of Auditors, below note 17.

fact, which under that system would typically be resolved through an audit process. Further, a ruling application relating to the application of any general or specific anti-avoidance provision may also be rejected.

Whatever the limits on the scope of issues that may be addressed, it would typically be appropriate to issue a ruling in the following circumstances:

- There is uncertainty with respect to the tax position of the taxpayer which is not readily able to be resolved via existing information/guidance, including rulings;
- The tax issue is also complex;
- The tax issue involves a significant amount of tax (either in total quantum, or relative to the taxpayer concerned);
- The tax issue is sufficiently material that it would be appropriate to provide formal legal certainty in the form of an advance tax ruling; and
- There is sufficient time to issue the ruling in the context of the particular transaction or dealing. Most advance tax rulings require a minimum of 30 days before being issued. However, it is not unusual for rulings in other jurisdictions to take between 60–90 days to be issued.

Conversely, it would typically be inappropriate to issue a ruling in the following circumstances:

- The issue is the subject of an audit or objection process, has previously been determined under audit, or relates to a tax assessment that has already been issued;
- The application or interpretation of the laws of a foreign country;
- The constitutionality of a tax law;
- The appropriateness of pricing of goods or services supplied or rendered to a connected person in relation to the applicant or a class member with the view to distinguishing the advance tax ruling from an advance pricing agreement (or APA);
- The issuance of the ruling would prejudice or unduly restrict the administration of the tax law;
- It is determined that the application is frivolous or vexatious;
- The proposed transaction or dealing is speculative and is not under serious contemplation by the taxpayer;
- The issuance of the ruling would not have any practical consequences (e.g. the application relates to an historic transaction and the amendment period has expired); and
- The ruling is only capable of being issued if certain assumptions are made (e.g. events or circumstances that cannot reasonably be determined at the time of the ruling, or where the tax treatment for the applicant depends on the tax treatment for other third parties, which have not applied for a ruling themselves).

Further, an advance tax ruling system can be designed so that a ruling can be issued in relation to a transaction currently being considered but not yet undertaken, as well as to a transaction which has been undertaken but in respect of which a tax return has not yet been filed. In the case of countries where an advance tax ruling system is being considered for the first time, it would typically be appropriate to limit the regime to proposed, immediately executable, complex and more significant transactions which are under very serious contemplation by taxpayers.

C. Ruling authority

Typically private tax rulings are issued by a specialized and centralized unit of the tax authority.[12] It is best practice to issue tax rulings in this manner, even if only on risk management grounds. For example, in South Africa, a binding ruling may only be issued by the Legal and Policy Division: Advance Tax Rulings Unit at the SARS Head Office. Similarly, in Canada advance rulings are issued by the Rulings Office, a centralized CRA headquarters' office.[13] This assists to achieve consistency with respect to the application of the tax laws between rulings and enhances oversight over the practice in general. In addition to ensuring quality control, consistency and oversight, it is important to have internal information sharing within the tax authority, in particular with the audit services, of rulings issued to, as well as ruling applications withdrawn, by taxpayers.

[12] In most countries private tax rulings are issued by the tax authority. A notable exception is Sweden where private rulings are issued by a body independent from the tax administration. Both models correspond to two different views of the nature of advance rulings, i.e. as *ex ante* tax assessments (thus by the tax authority) on the one hand or *ex ante* judgments (thus by an independent body) on the other hand.

[13] Even if not all members of this office are physically stationed at central headquarters.

D. Binding force and precedential effect

A private tax ruling constitutes legally binding advice which a taxpayer may seek from the tax authority. This is consistent with the objective of an advance tax ruling system which is to provide certainty to taxpayers in connection with the application and interpretation of the tax laws. In this regard, the ruling typically binds the tax authority such that the taxpayer will ordinarily be protected from additional tax, penalties and interest when relying on the ruling issued.[14] Importantly, the binding nature of the ruling ordinarily may endure, even in circumstances where the advice which was the subject of that ruling is subsequently held (e.g. by a court) to be an incorrect application of the relevant tax law.[15] However, the tax authority should be able to withdraw a ruling where reasonable cause exists to do so (e.g. there has been a mistake identified in the interpretation or application of the tax law, including where a ruling has been issued in a manner which is inconsistent with a county's existing international legal obligations such as those embodied in existing tax treaties). The sample set of provisions contained in Appendix B have been drafted on this basis.

The benefit of a private tax ruling is personal to the taxpayer to whom the ruling is issued. Other taxpayers, even if the same or similar circumstances exist, cannot derive legal rights from it. For instance, a private tax ruling cannot formally be cited as an authority by another taxpayer in their own court proceedings. This common key feature of a private tax ruling system is important for the following reasons:

- *It limits the systemic revenue risk if an incorrect tax ruling is issued or published,* as the benefit of that ruling is confined to the taxpayer to whom the ruling has been issued. On the basis that a ruling is commonly issued in the context of a time sensitive transaction, the speed within which that ruling needs to be issued to provide timely guidance to the relevant taxpayer may increase the potential risk of error. However, the potential issuance of inappropriate (or anti-competitive) rulings as between two taxing jurisdictions does increase the need for an appropriate exchange of information in relation to those rulings under a transparency framework (also discussed further below).
- *It limits the risk of the private ruling being inappropriately applied as a tax conclusion of more general application.* In this regard, a tax conclusion in a private tax ruling is often dependent on the particular—and often unique—facts. Given the need to issue the ruling in a timely manner, those facts may not be fully described or elaborated in the final ruling, or may be redacted from the published version of the ruling on privacy or competition grounds. This may mean that key factual differences requiring a different tax outcome or treatment may be subtle and not be capable of being properly identified from the content of the published ruling itself.

Nevertheless, private rulings—even where they are not made public—have some precedential effect. This is obvious where private rulings are published, even in redacted form. However, even unpublished private rulings have some precedential effect as these rulings will, inevitably, also become known to taxpayers typically through the tax advisory community.

However, best practice suggests that private rulings should be disclosed in appropriately sanitized form. In this regard, to address transparency concerns with private rulings both among taxpayers and taxing jurisdictions best practice suggests that private rulings should not only be made public—albeit edited or sanitized to protect taxpayer privacy—but should also be exchanged internationally with such an exchange being supported by an accommodative legal framework.[16]

E. Subject to administrative and/or judicial review

It would need to be determined whether the decision by the tax authority in a ruling should be made subject to administrative and/or judicial review. While different jurisdictions have differing practices in this regard, it would be appropriate not to make the decision by the tax authority reviewable in circumstances where the ruling is binding on the tax authority but not the taxpayer. This is because, even in systems where adverse private tax rulings cannot be appealed directly, the taxpayer will still be able to appeal the assessment made in accordance with the adverse ruling if the taxpayer proceeds with the transaction despite the adverse ruling. The sample set of provisions contained in Appendix B have been drafted on this basis.

[14] This is typically the case even where advance rulings do not have legal binding force in law. For instance, the CRA considers itself bound by the rulings it issues despite the Canadian ruling practice not being based on a legal framework stipulating that rulings are legally binding on CRA.

[15] This may be more contentious in some systems. Where the applicant knew or should have known that the ruling was 'contra legem', however, the person would ordinarily be precluded from relying on the ruling.

[16] See below note 20 and 21.

F. Cost-recovery fee structures

There are divergent international practices with respect to the charging of a time-based fee for advance tax rulings, with a number of arguments for and against adopting a fee-based structure. There are concerns that a fee-based structure could undermine the neutrality and independence of the rulings process and outcome. Further, a high relative cost also potentially undermines the objective of providing equal access to the advance tax ruling system, particularly for taxpayers with limited resources. Where advance rulings are published—as is recommended—they also provide value to other taxpayers in similar circumstances. Using a fee-based structure to limit taxpayer demand for the rulings system also limits an otherwise legitimate avenue for interaction between the taxpayer community and the tax administration, particularly in a context where a taxpayer is seeking advance guidance to ensure full compliance with the tax laws. This is a circumstance which should ordinarily be encouraged under a self-assessment tax system. For these reasons, some jurisdictions do not charge a fee or any time-based charge (e.g. the Netherlands, Australia, Belgium).

However , there are also strong arguments in favor of adopting a proper cost-recovery fee structure. Firstly, such a structure may overcome some of the initial implementation difficulties experienced by other countries (such as initial resource reallocation or diversion issues, as well as producing a limit on market demand where the surplus initial demand for rulings would otherwise exceed the authorities' capacity to deliver them within a reasonable time). Secondly, a ruling delivers material value to the taxpayer concerned and the value of the certainty it provides is likely to far outweigh the possible substantial cost under a cost recovery system. Thirdly, the tax administration will generally require a team of highly qualified people in order to maintain the quality and consistency of the ruling process, with the cost of this administrative structure being appropriate to recover from those who most directly benefit from it. If the costs of the ruling process are absorbed by the tax administration, there is also the potential that resources are diverted from other tax administration functions. Lastly, it may be appropriate to consider charging a higher cost-recovery fee for more urgent and expedited rulings.

G. Publication of rulings

While not universal, the practice of publishing and reporting private rulings (even in redacted form) subsequent to issuance is considered best practice in order to promote greater transparency and legislative oversight, and to further support the general objectives of achieving certainty and consistency of the ruling system as a whole. Further, the tax authority should publish an annual report on the issue of advance tax rulings by reporting on the total number of rulings granted and an estimate of their revenue impact. The number of rejected advance tax ruling applications should be reported on as well. This approach would provide to a parliamentary oversight committee or national audit office the basis to debate the advance tax ruling regime and it would guarantee the legislature's ongoing supervision of that regime.[17] Further, in addition to publishing and reporting on private rulings to address transparency concerns with private rulings both among taxpayers and taxing jurisdictions—albeit edited or sanitized to protect taxpayer privacy—they should also be exchanged internationally with such an exchange being supported by an accommodative legal framework.[18]

Substantial risks can arise where confidential advance tax rulings are not published or otherwise reported. The discretion given to the tax authority to issue private tax rulings can lead, in more extreme cases, to 'private law making' outside the normal legislative process. In this regard, the issue of private tax rulings by the tax authority has the potential to give rise to a parallel method of tax policy-making, thereby resulting in a hidden source of tax law which runs counter to the normal operation of the rule of law. Private tax rulings should not be used to short circuit the policy ratification process by the legislature which often carefully considers tax law design options and then ultimately passes the tax laws following appropriate debate and oversight. Similarly, only the legislative process can achieve full transparency of a country's international commitments in the area of tax policy and administration.

[17] See, for instance. Belgian Court of Auditors (Cour des Comptes/Rekenhof) *Advance Tax Rulings Service*, Report to the House of Representatives, February 2013, available online at https://www.ccrek.be/NL/Publicaties/Fiche.html?id=600eb1c9-c4da-4142-9a7d-fd48914ad095.

[18] See below note 21.

H. Exchange of rulings

There are strong arguments in favor of exchanging rulings between jurisdictions. This is because private tax rulings issued by one jurisdiction can have an adverse revenue impact on other jurisdictions. For example, a preferential ruling in one country may provide tax planning opportunities whereby a taxpayer seeks to arbitrage that tax preference by shifting profits from another (high taxing) jurisdiction to the first (preferential) jurisdiction. However, the basis of such an exchange, even if generally justified on transparency grounds, would still typically need an accommodative legal framework. To be effective the framework needs to be broad enough to encompass all rulings that exhibit the same essential features that give rise to the concerns underlying the need for greater transparency in this area.

There is a strong move towards an international framework for exchange. Private rulings have not traditionally been exchanged as a matter of course between partner countries, nor indeed between different levels of government within federal states.[19] However, to address transparency and base erosion concerns that cannot be fully addressed through the 'sanitized' domestic publication of rulings, two recent international initiatives stand out: the OECD's work on improving transparency in relation to rulings in the context of the Forum on Harmful Tax Practices and Action 5 of the OECD/G20 BEPS Project on the one hand,[20] and the EU initiative in the context of the Commission's Tax Transparency Package on the other hand.[21] While both initiatives pursue similar objectives their scope and mechanism are not identical.[22] These differences, however, are appropriate given the different context in which they are being developed, with the need for a greater level of transparency in the context of the EU's internal market.

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[19] For instance, in the US, the IRS and the state revenue services do not systematically share private letter rulings. However, and to the extent relevant to determine their respective tax bases, there is a legal basis and mechanism in place that would allow for such information to be shared on request. Of course, it generally depends on a country's particular fiscal federalism arrangements—in particular with respect to determining tax bases and administering taxes at federal and state levels—whether it is relevant that rulings be shared between different levels of government within the same country.

[20] Within the context of the OECD/G20 BEPS Project countries have also committed to implementing a framework for compulsory spontaneous exchange of information on six categories of rulings, i.e. (i) rulings relating to preferential regimes; (ii) unilateral APAs or other cross-border unilateral rulings in respect of transfer pricing; (iii) cross-border rulings providing for a downward adjustment of taxable profits; (iv) permanent establishment (PE) rulings; (v) related party conduit rulings; and (vi) any other type of ruling agreed by the Forum on Harmful Tax Practices that in the absence of spontaneous information exchange gives rise to BEPS concerns; see OECD (2015), Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report.

[21] See, for example, the recently adopted 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 (OJ L332, 18.12.2015, p. 1–10), which introduces a framework for automatic exchange of advance cross-border rulings and advance pricing agreements between EU member states and the European Commission from January 1, 2017 onwards.

[22] 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 (see above note 20). The EU initiative, on the other hand, 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 (see above note 21).

[23] The authors acknowledge the benefit of the comments and thoughts of each of Michael Keen, Peter Barrand and Martin Grote of the IMF's Fiscal Affairs Department.

APPENDIX A

SELECTED FEATURES OF THE REVENUE RULING SYSTEM

	Public rulings are		Private rulings are			
Country	Issued	Binding	Issued	Binding	Subject to time limits (time limit)	Subject to fees
OECD Countries						
Australia	✓	✓	✓	✓	✓ (28 days) /1	x
Austria	✓	✓	✓	✓ /1	✓	✓ /1
Belgium	✓	✓	✓	✓	✓ (3 months)	x
Canada	✓	x	✓	✓	✓ (varies by tax) /1	✓ /2
Chile	✓	✓	✓	✓	x	x
Czech Republic	✓	✓	✓	✓	✓	x
Denmark	✓	✓	✓	✓	✓	✓
Estonia	✓	✓	✓	✓	(60 days) /1	✓
Finland	✓	✓	✓	✓	✓	✓
France	✓	✓	✓	✓	✓ (3 months)	x
Germany	✓	✓	✓	✓	x	✓
Greece	✓	✓	✓ /1	✓ /1	✓ (120 days)	✓
Hungary	✓	✓	✓	x	✓ (30 days)	x
Iceland	✓	✓	✓	✓ /1	✓	✓
Ireland	✓	✓	✓	✓	✓	x
Israel	✓	✓	✓	✓	✓	x /1
Italy	✓	✓ /1	✓	✓ /1	✓	x
Japan	✓	✓	✓	x	x	x
Korea	✓	✓	✓	✓	✓ (1 month)	x
Luxembourg /1	✓	✓	✓	✓	x	x
Mexico	✓	✓	✓	✓	✓ (3 months)	x
Netherlands	✓	✓	✓	✓	x	x
New Zealand	✓	✓	✓	✓	✓ (3 months)	✓
Norway	✓	✓	✓	✓	✓	✓
Poland	✓	✓	✓	✓	✓ (3 months)	✓
Portugal	✓	✓	✓	✓	✓ (150 days) /1	✓
Slovak Republic	✓	✓	✓	✓ /1	✓ /1	✓ /1
Slovenia	✓	✓	✓	✓	✓	✓
Spain	✓	✓	✓	✓	✓	x
Sweden	✓	✓	x	n.a.	n.a.	n.a.
Switzerland	✓	✓	✓	✓	x	x
Turkey	✓	✓	✓	✓	x	x
United Kingdom	✓	✓	✓	✓	✓	x
United States	✓	✓	✓	✓	x	✓
Non-OECD countries						
Argentina	✓	✓	✓	✓	✓ (90 days)	x
Brazil	✓	✓	✓	✓	✓ (360 days)	x
Bulgaria	✓	✓	✓	x	✓	x
China	x	x	x	x	x	x
Colombia	✓	✓	x	x	x	x
Costa Rica	✓	✓	✓	✓	✓ (2 months)	x
Croatia	✓	✓	✓	✓	x	x
Cyprus	✓	✓	✓	✓	✓ (30 days)	x
Hong Kong, China	✓	x	✓	✓	✓ (6 weeks)	✓
India	✓ /1	✓	✓ /2	x	x	✓
Indonesia	✓	✓	x	x	x	x
Latvia	✓	✓	✓	✓	✓ (1 month) /1	x
Lithuania	✓	✓	✓	✓	✓ (60 days) /1	x
Malaysia	✓	✓	✓	✓	✓ (60 days)	✓ /1
Malta	✓	✓	✓	x	x	x
Morocco	✓	✓	✓	✓	x	x
Romania	✓	✓	✓	✓	✓	✓
Russia	✓	✓	✓	✓	✓ (1 month)	x
Saudi Arabia	✓	✓	✓	✓	x	x
Singapore	✓	✓	✓	✓	✓ (varies by tax) /1	✓ /1
South Africa	✓	✓	✓	✓	✓ (varies) /1	✓
Thailand	✓	✓	✓	✓	3 months	x

/1. **Australia:** Where the taxpayer's request raises particularly complex matters that will take more than 28 days to resolve after receiving all the required information, an extended reply date is negotiated. **Austria:** From 2011 only private rulings on group taxation, business restructuring or transfer pricing are binding on the revenue body and fees will be charged. **Canada:** Income Tax – within 90 business days of receipt of all essential information from the client; GST/HST – within 45 working days of receipt in the CRA. This excludes highly technical and precedent and/or policy-setting GST/HST rulings and interpretations. **Estonia:** With provision to extend by 30 days. **Greece:** Private rulings only apply as regards to Advance Pricing Agreements (APAs). **India:** Central Board of Direct Taxes issues Circulars, which are in the nature of public guidance. **Israel:** Fees are required only for rulings on mergers and acquisitions. **Latvia:** 1 month is norm but may be extended for objective reasons up to 4 months, subject to notification of this to applicant. **Italy:** Rulings are binding only on the Revenue Agency. **Lithuania:** 60 days is norm but further 60 days may be added where additional examination required. **Luxembourg:** Direct taxes only. **Malaysia:** Fees are charged only for Advanced Private Rulings. **Portugal:** 150 days is norm but can be 90 days if a request to justify its urgency is made by the taxpayer and accepted by the tax administration. **Singapore:** 8 weeks for income tax and 4 weeks for GST; expedited rulings can be made for an additional fee. **Slovak Republic:** There is no general period within which the revenue body (SFA) is obliged to issue a private ruling following a taxpayer's request. The SFA will issue (on the basis of the written request of the taxpayer) the binding statements (defined by the Tax Procedure Code) to the tax regulations application from 1 September 2014. In such cases, the issuing period is to be defined 60 days from the day of the written request delivery (max. 6 calendar months – after consultation with the taxpayer). Required fee is 1% (at minimum EUR 4 000), 2% (at minimum EUR 5 000) or 3% (at minimum EUR 6 000) of the assumed business case value. These binding statements are binding for the revenue body and the second-instance (appellate) authority. **South Africa:** Depends on complexity of ruling.

/2. **Canada:** Only private rulings on income tax matters are subject to a fee. **India:** Tax administration does not give private rulings. There is the institution of the Authority of Advance Rulings which the taxpayers may approach for a ruling on specific facts applicable to their case.

Source: OECD (2015), Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies, OECD Publishing, Paris.

APPENDIX B
SAMPLE LEGISLATIVE PROVISIONS FOR AN ADVANCE RULING REGIME

Set out below is a sample set of provisions establishing an advance tax rulings regime. The provisions are general in nature and in the form of simplified sample provisions. Importantly, they do not take into account the individual circumstances of any particular tax system. The ultimate legal framework for the introduction or codification of an advance ruling regime in any given country would need to take into account the specific legal tradition and system, as well as the political and administrative structure and fiscal policies, of the country concerned. Further, the more detailed procedural rules need not be reflected in the overarching law but could form part of any underlying regulations or interpretative or guidance notes. The overarching legal framework may merely operate to support the power of the tax authority to issue the rulings and codify the key features of the advance ruling regime being established.

Chapter I—Private Rulings

Article 1. Binding Private Rulings

Article 2. Refusing an Application for a Private Ruling

Article 3. Making a Private Ruling

Article 4. Withdrawal of a Private Ruling

Article 5. Publication of Private Rulings

Binding Private Rulings

Article 1.

(1) A taxpayer may apply to the tax authority for a private ruling setting out that tax authority's position regarding the application of a tax law to a transaction which is proposed to be entered into by the taxpayer.

(2) An application under this Article must be in writing and:

(a) include full details of the transaction to which the application relates together with all documents relevant to the transaction;

(b) specify precisely the question on which the ruling is required; and

(c) give a full statement setting out the opinion of the applicant as to the application of the relevant tax law to the transaction.

(3) Subject to Article 2, the tax authority shall, within 60 days of receipt of the application under this Article, issue a private ruling on the question to the applicant.

(4) If the taxpayer has made a full and true disclosure of all aspects of the transaction relevant to the making of a private ruling and the transaction has proceeded in all material respects as described in the taxpayer's application for the private ruling, the private ruling is binding on the tax authority as against the taxpayer identified but is not binding on the tax authority as against any other taxpayer.

(5) A private ruling is not binding on a taxpayer.

Refusing an Application for a Private Ruling

Article 2.

(1) The tax authority may refuse an application for a private ruling if any of the following applies:

(a) the tax authority has already decided the question that is the subject of the application in any of the following:

(i) a notice of a tax assessment served on the applicant;

(ii) a notice or other guidance issued by the tax authority that is in force;

(iii) a ruling published under Article 5 that is in force;

(b) the application relates to a question that is the subject of a tax audit in relation to the applicant or an objection lodged by the applicant;

(c) the application is frivolous or vexatious;

(d) the transaction to which the application relates has not been carried out and there are reasonable grounds to believe that the transaction will not be carried out;

(e) the applicant has not provided the tax authority with sufficient information to make a private ruling;

(f) in the opinion of the tax authority, it would be unreasonable to comply with the application, having regard to the resources needed to comply with the application and any other matters the tax authority considers relevant;

(g) the making of the ruling involves the application of a tax avoidance provision.

(2) The relevant tax authority must serve the applicant with a written notice of a decision to refuse to make a private ruling under this Article.

Making a Private Ruling

Article 3.

(1) The tax authority makes a private ruling by serving written notice of the private ruling on the recipient of the ruling.

(2) The tax authority may make a private ruling on the basis of assumptions about a future event or other matters as considered appropriate.

(3) A private ruling must state that it is a private ruling, set out the question ruled on, and identify the following:

(a) the taxpayer;

(b) the tax law relevant to the private ruling;

(c) the tax period to which the ruling applies;

(d) the transaction to which the ruling relates;

(e) any assumptions on which the ruling is based.

(4) A private ruling is made when the applicant is served with written notice of the ruling and the ruling remains in force until withdrawn under Article 4.

(5) A private ruling sets out the tax authority's opinion on the question raised in the ruling application and is not a decision of the tax authority that can be formally reviewed, appealed or otherwise objected to, for the purposes of this law or any other law. For the avoidance of doubt, this Article does not limit in any way a taxpayer's rights with respect to any tax assessment served on the taxpayer to which the ruling relates.

Withdrawal of a Private Ruling

Article 4.

(1) The tax authority may, for reasonable cause, withdraw a private ruling, in whole or part, by written notice served on the applicant.

(2) When legislation is passed that is inconsistent with an existing private ruling, the private public ruling is treated as withdrawn to the extent of the inconsistency.

(3) The withdrawal of a private ruling, in whole or part, has effect from:

(a) when paragraph (1) applies, the date specified in the notice of withdrawal; or

(b) when paragraph (2) applies, from the date of application of the inconsistent legislation.

(4) A private ruling that has been withdrawn:

(a) continues to apply to a transaction of the applicant commenced before the ruling was withdrawn; and

(b) does not apply to a transaction of the applicant commenced after the ruling was withdrawn to the extent the ruling is withdrawn.

Publication of Private Rulings

Article 5.

(1) The tax authority must publish a ruling made under Article 4 in the Gazette except that the identity of the applicant to whom the ruling relates must not be indicated in the publication.

(2) When a ruling has been withdrawn in accordance with section Article 4, the tax authority must immediately publish a notice of withdrawal in the Gazette stating that the ruling ceases to be binding with effect from the date determined under Article 4(3).