

WILL THE EUROPEAN UNION PUT AN END TO THE “GOLDEN AGE” OF TAX RULING?*

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Abstract: The article deals with the problematic of evolution of regulation of tax rulings. The author indicates the main trends in this process. The most important is that more and more often the holder of the tax ruling is not protected by it. The lack of protection is justified by the desire to combat tax avoidance.

Keywords: tax ruling; European Union

Klíčová slova: závazné posouzení; Evropská unie

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1. TAX RULINGS – TERMINOLOGICAL ISSUES

According to the definition published in the OECD Glossary, advance ruling is considered to be “*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*”.¹ According to the popular *International Tax Glossary*,² advance ruling is understood similarly. It indicates that a taxpayer planning a transaction may need to consult the tax authorities to ascertain all the consequences.³ The author of the dictionary then points to the different conditions for obtaining *rulings* and their varying legal value in different countries.⁴

The terminological relationships between rulings and advance pricing agreements are not entirely clear. According to the OECD’s position the advance pricing agreement

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¹ <https://www.oecd.org/ctp/glossaryoftaxterms.htm>.

² *International Tax Glossary*, 3rd edition, Amsterdam: IBFD 1996.

³ *Ibidem*, p. 6.

⁴ Advance tax ruling is understood similarly by RIVIER, J.-M. *Introduction*. in: *Advance Ruling: Practice and Legality, Proceeding of a Seminar held in Cancun, Mexico, in 1992 during the 46th Congress of the International Fiscal Association*, vol. 17a, Deventer-Boston 1994, p. 3; ELLIS, M. J. General Report. In: *Advance rulings*. Cahier de Droit Fiscal International, Vol. VLXXXIVb, The Hague 1999, p. 22. The definitions they cite indicate only a problem with deciding whether and to what extent the rulings are binding on the tax administration.

(APA) is “An arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables, and appropriate adjustments thereto, and critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time”. There is a belief that the term tax ruling is an umbrella term for all “arrangements” between the taxpayer and the tax authorities. The BEPS project assumes that ruling is “any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely”.⁵ This category would therefore include advance tax ruling, advance pricing agreement, and any other tax arrangement. However, usually, advance pricing agreements are treated somewhat differently, as what matters is the economic aspect of the problem and not just the strict interpretation of the “letter of the law”. This study adopts a broad understanding of the term tax ruling as also covering the APA. It will refer only to so-called private tax rulings, i.e. a “ruling granted by the tax authorities to a single taxpayer”.⁶ General interpretations addressed to all taxpayers are not as much of an issue for EU authorities as individual ones.

2. ADVANCE TAX RULINGS AS AN INSTRUMENT TO FACILITATE TAX AVOIDANCE

Tax ruling is an instrument that is essentially “taxpayer-friendly”. At the same time, it is indispensable in the face of the increasing, and probably inevitable,⁷ complication of tax law. It gives the taxpayer greater certainty as to the scope of his or her tax obligations, significantly limiting the possibility of surprising the taxpayer with a pro-fiscal interpretation of a tax law provision.

The problem is that they can also be used by a taxpayer who obtains an interpretation not for the sake of legal certainty, but in the context of his or her attempt at tax avoidance. Sometimes a taxpayer’s way of acting may consist in obtaining more interpretations “protecting” individual elements of a complex economic operation. By dividing the planned economic operation into parts, the abusive nature of the operation as a whole disappears from the perspective of the tax authority. Each element of the operation is legal and not abusive. As a result, the tax authority sees neither the need for nor the possibility of using instruments against tax avoidance. Even if it is not possible to apply them,⁸ the concealment of the abusive nature of the operation may still have some significance for its success. The establishing of the abusive nature of a taxpayer’s action by the tax authority may be an incentive for the latter to attempt an interpretation

⁵ E.g. VAN DE VELDE, E. “Tax rulings” in the EU Member States. Study for the ECON Committee. IP/A/ECON/2015-08, November 2015, p. 34.

⁶ International Tax Glossary, op. cit. p. 233.

⁷ See more, e.g.: POLLACK, S. D. Tax Complexity, reform, and the illusions of tax simplification. *George Mason Independent Law Review* 1994, No. 2; PREBBLE, J. Can Income Tax be Simplified? *New Zealand Journal of Taxation Law and Policy* 1996, No. 2; JAMES, S. – SAWYER, A. – BUDAK, T. *The Complexity of Tax Simplification: Experiences From Around the World*. London: Palgrave Macmillan, 2016.

⁸ For example, because of the absence of the so-called general anti-abuse clause or similar specific clauses.

of the law that is unfavourable to the taxpayer so as to prevent the taxpayer from obtaining tax benefits.

International tax avoidance gives the taxpayer new opportunities. The taxpayer can take advantage of several national tax systems, or more specifically their inconsistencies, to avoid taxation by making additional use of double taxation conventions between them. In such a case, the actions taken in each country, if considered separately, may not only not be abusive, but may be perfectly natural for the authority. It can then be quite easy to obtain a favourable official interpretation in each country.

Fighting such actions of taxpayers may consist, in e.g. refusing to grant protection resulting from a tax ruling when the taxpayer's action constitutes an abuse of tax law.⁹

3. WHEN THE STATE BECOMES A PARTNER IN CRIME (REAL OR ALLEGED)¹⁰

However, tax avoidance or evasion is not always about the taxpayer fighting against the state. Unfortunately, sometimes countries themselves behave uncooperatively towards each other and in fact facilitate tax avoidance. Harmful tax competition may also consist in issuing tax ruling that are beneficial to taxpayers and that facilitate tax avoidance (or sometimes tax evasion) in another country.

The case of Luxembourg in particular has met with quite widespread interest, not only in the media, but also in the European Parliament. The country has become “famous” to such an extent that even a special name for the scandal in which it was involved has been created: *LuxLeaks*. The country adopted a tax system which was favourable for foreign companies. At the same time, it was possible to obtain *rulings* which confirmed the legality of the action consisting in the “transfer” of corporate profits to Luxembourg, where they would in fact be taxed in a very preferential manner. Typically, transfer pricing and intra-group loans mechanisms were used. Such an action was safe for the taxpayer, as he or she obtained a tax ruling from the tax administration.

Attention should be paid to the regulations on tax ruling in Luxembourg at the time. It is interesting because it was simply ... non-existent. At the time of LuxLeaks, Luxembourg law made no mention of tax rulings. Article 101 of the Constitution of the Grand Duchy of Luxembourg prohibits all tax privileges. A tax exemption (*une exemption*) and a tax reduction (*une moderation*) can only be introduced by way of a legal act (*en vertu de la loi*).¹¹ The content of the above quoted provisions should lead to the quite obvious conclusion that statutory rules prevailed in Luxembourg law over possibly contradictory

⁹ This solution is in force in Poland on the basis of Article 14na of the Tax Ordinance.

¹⁰ Whether the actions taken by the following corporations, such as Google, Starbucks, Apple, FIAT and others, as well as the authorities of Ireland, Luxembourg, Belgium, etc. that cooperated with them were legal, is subject to dispute before the EU Court of Justice. There is no doubt that large multinational corporations have been “kindly” treated by these countries, but it is not certain whether these activities were illegal.

¹¹ Text of the Constitution of the Grand Duchy of Luxembourg via the government website www.legilux.public.lu.

rules resulting from official tax law interpretations or the results of negotiations between the taxpayer and the tax authority.

The system of tax rulings was essentially based on general principles of law and the legal culture of the tax administration. General principles of law in the reference literature were sometimes treated as a specific source of law.¹² The principle of good faith (*bon foi*) closely related to the principle of legal security (*le principe de sécurité juridique*) was of fundamental importance. On this basis, the tax authorities in Luxembourg issued both general and individual interpretations of tax law, which were respected in practice.¹³

An intriguing scenario has developed. On the one hand, there was a fairly resilient system of tax rulings, but this system was “camouflaged” so well that in the 2007 OECD report (concerning 2006), Luxembourg was listed as a country where no private rulings were issued.¹⁴

What developed in Luxembourg was essentially a discretionary system of “creating” tax law for the benefit of large multinational corporations. In the modern world, this schizophrenic state of affairs could not exist indefinitely. Information about the fraudulent practices of the Luxembourg administration was disclosed by lawyers¹⁵ from one of the large tax advisory firms to journalists of the International Consortium of Investigative Journalists (ICIJ).¹⁶ The authorities of the Duchy claimed that the activities of the tax administration were fully legal and based on Luxembourg tax law. However, this is hard to believe.

4. ADVANCE TAX RULINGS IN THE BEPS PROJECT

The issue of using tax rulings for tax avoidance purposes could not remain outside the sphere of interest of the BEPS project. In fact, the Forum on Harmful Tax Practice (FHTP)¹⁷ had already been set up before and was still used in BEPS Action 5.¹⁸

¹² STEICHEN, A. *Manuel de droit fiscal. Droit fiscal général*. Éditions Saint Paul, Luxembourg 2006, p. 548. The author placed the general principles of the law in a chapter devoted to “other sources”, such as custom, and not in a chapter concerning for example laws or regulations (des règlements).

¹³ GUILLOTEAU, F. – LINZ, S. Luxembourg. In: SANDLER, D. – FUKS, E. (eds.). *The International Guide to Advance Rulings*. Amsterdam: IBFD 1997–2003.

¹⁴ *Tax Administration in OECD and Selected Non-OECD Countries*, Comparative Information Series 2006, OECD February 2007, p. 88, available at: <https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/comparative/CIS-2006.pdf>.

¹⁵ Interestingly, the punishments applied to those who disclosed these actions, not to those who benefited from them. It was not until 2018 that the former PricewaterhouseCoopers employee Antoine Deltour was declared a whistleblower free from criminal liability. However, his associates were not so lucky (BBC: *Luxleaks whistleblower Antoine Deltour has conviction quashed*, available at: <https://www.bbc.com/news/world-europe-42652161>).

¹⁶ See <https://www.icij.org/project/luxembourg-leaks/your-head-spinning-5-tips-understand-lux-leaks-files>.

¹⁷ See more: *Harmful Tax Competition: An Emerging Global Issue*, Report OECD 1989, available at: <https://www.oecd.org/tax/harmful/1904176.pdf>.

¹⁸ *Countering Harmful Tax Practice More Effectively, Taking into Account Transparency and Substance*, Action 5 – 2015 Final Report, OECD/BEPS Base erosion and Profit Shifting Project, OECD Publishing Paris, 2015, p. 9 ff, available at: <https://www.oecd.org/tax/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report-9789264241190-en.htm>.

BEPS dealt with tax rulings mainly as an instrument of harmful tax competition. This is a noteworthy circumstance. The BEPS project in this respect was mainly directed against uncooperative states which were prepared to cooperate with large corporations for individual benefit, causing erosion of the tax base.

The BEPS project identified lack of transparency as a major problem of tax interpretation. The first step was to ensure transparency in relation to this specific category of rulings, which introduce preferential (compared to typical statutory) taxation regimes. The next step would be to consider extending transparency to other types of interpretations. The third step is to work out common principles of good practice in issuing rulings.¹⁹

OECD activities refer to classical tax rulings, but also to advance pricing agreements. This was justified by the fact that transfer pricing is the “favourite” instrument for the transfer of income.

Unfortunately, the OECD proposals in the BEPS project concern only private tax rulings (individual interpretations).²⁰ Such an OECD position is in my opinion a negative one. There is no doubt that general rulings differ in many aspects from individual interpretations (usually simply referred to as rulings or private rulings). These differences concern, for example, the manner in which they are issued. However, they may also be used to create exceptional, preferential (and thus harmful to other countries) tax regimes. To make matters worse, the scope of impact of general interpretations is obviously broader than that of individual ones. Thus, they may create systems of unfair tax competition with much greater severity. Furthermore, such action usually remains outside the scope of social control, as the “creation” of tax law in this way takes place outside parliamentary procedure. Of course, in the case of general rulings, there is less risk of selectivity of the implemented solutions.

5. THE EU IN THE FACE OF ADVANCE TAX RULINGS – MORE AND MORE SUSPICION

The LuxLeaks scandal revealed a second, worse face of tax rulings. It also aroused great media interest, with Jean Claude Juncker, President of the European Commission, who was previously Minister of Finance and Prime Minister of the Luxembourg government, appearing in its context. His statements that he knew nothing about the whole affair are unfortunately unreliable. It is not surprising that the scandal has encouraged even the European Parliament to address the subject of tax rulings.

The report of the European Parliament’s Special Committee²¹ on Tax Rulings and Other Measures Similar in Nature or Effect²² concluded that broadly understood tax

¹⁹ *Countering Harmful Tax Practice More Effectively, Taking into Account Transparency and Substance*, op. cit. pp. 45–46.

²⁰ *Countering Harmful Tax Practice More Effectively, Taking into Account Transparency and Substance*, op. cit. p. 48.

²¹ This committee was later referred to as TAX1, in contrast to the similar TAX2 committee operating between 2015 and 2016, which continued its work. The currently working committee is TAX3.

²² Report on tax rulings and other measures similar in nature or effect (2015/2066(INI)) *Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect* Co-rapporteurs: Elisa Ferreira and Michael Theurer.

rulings “are not intrinsically problematic since they can, as is their original purpose, provide legal certainty for the taxpayer and reduce the financial risk for honest firms in cases where the tax laws or their particular application in certain circumstances are unclear or subject to diverging interpretations, in particular with regard to complex transactions, and thereby avoid future disputes between the taxpayer and the tax authority”.

The Committee pointed out the need for cooperation and coordination with regard to individual tax rulings. It was considered necessary to promote the automatic exchange of tax information, including on issued interpretations. It also invited Member States “to consider that any tax ruling should, in particular when involving transfer pricing, be established in cooperation with all involved countries, that the relevant information should be exchanged between them automatically, comprehensively, and without delay, and that any national action aimed at reducing tax avoidance and tax base erosion within the EU, including audits, should be carried out jointly, giving due consideration to the experience gained through the FISCALIS 2020 programme”.²³

The Committee also suggested that steps should be taken to create EU-wide mechanisms, for example in the form of an EU-wide clearing house system through which the Commission would carry out a systematic review of tax law interpretations in order to increase the level of certainty, consistency, uniformity and transparency of the system and to check whether such interpretations have a detrimental effect on other Member States. This moderate approach was continued by another EP Committee.²⁴

Also the preamble of Council Directive (EU) 2015/2376 of 8/12/2015 introducing instruments to counteract the use of official interpretations of tax law for tax avoidance²⁵ indicates that “The issuance of advance tax rulings, which facilitate the consistent and transparent application of the law, is common practice, including in the Union. By providing certainty for business, clarification of tax law for taxpayers can encourage investment and compliance with the law and can therefore be conducive to the objective of further developing the single market in the Union on the basis of the principles and freedoms underlying the Treaties”.²⁶ However, in the next sentence, the EU legislator indicated that: “However, rulings concerning tax-driven structures have, in certain cases, led to a low level of taxation of artificially high amounts of income in the country issuing, amending or renewing the advance ruling and left artificially low amounts of income to be taxed in any other countries involved. An increase in transparency is therefore urgently required.”

The message from the European Parliament is quite clear that hardly anyone denies the usefulness of tax rulings. The only problem is the degeneration of the system of their issuance.

²³ Clause 104 of the EP resolution draft.

²⁴ See: *Report on tax rulings and other measures of similar nature or effect* (TAXE 2) (2016/2038(INI)). Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE 2), co-rapporteurs: J. Kofod and M. Theurer, European Parliament 29. 6. 2016, available at: https://www.europarl.europa.eu/doceo/document/A-8-2016-0223_EN.html.

²⁵ 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 EU L 332 of 2015, p. 1).

²⁶ Clause 1, sentence 3 of the Preamble.

6. TAX RULING NON-COMPLIANT WITH THE EU LAW DOES NOT PROTECT THE OWNER?

The actions of the European Parliament affected (to a rather limited extent) tax rulings as a legal instrument. They could have led to a certain limitation of the scope of functioning of the instrument of tax ruling. However, they did not directly affect the interests of those entities which had already set up their interests on the basis of previously obtained tax rulings. The actions of such taxpayers were based on the trust they placed in their tax rulings. This trust was based either on the provisions of law which guaranteed legal security for the taxpayer acting in confidence in a tax ruling, or on general principles of law with similar effect.²⁷

For the owner of a tax ruling, the views that a tax ruling contrary to EU law does not protect the taxpayer at all were much more dangerous. Such views are discussed in many countries. For example, in France, the judgment of the Cour Administrative d'Appel (CAA) in Paris of 17 December 1991²⁸ allowed the taxpayer to rely on an interpretation that was even contrary to the EU law. A subsequent judgment of the CAA in Douai on 26 April 2005 presented a different view,²⁹ which the court based on the primacy of EU law over national law. However, later, on 25 March 2010,³⁰ the CAA in Paris maintained its earlier view on the possibility of relying on interpretations that are even contrary to EU law. The French literature pointed out that the protection of the taxpayer is in line with the general principles of EU law, such as the protection of legitimate expectations³¹. In any case, there are examples where EU law itself protects the recipients of interpretations issued under customs law, even if it has already been formally established that they are flawed³².

These views have been given a second life with the emergence of the LuxLeaks scandal and the disclosure of the massive use of tax rulings as instruments of harmful tax competition.

²⁷ See the case of Luxembourg in LuksLeaks times, where the law was silent about tax rulings overall, but taxpayers could feel safe.

²⁸ Judgment of the CAA in Paris from 17 December 1991, no. 357, *Restauration Gestio*, *Revue de jurisprudence et des conclusions fiscales* (RJF) 1992, no. 2, p. 232.

²⁹ Judgment of the CAA in Douai from 26 April 2005, no. 02DA00736, *Segafredo Zanetti France*, RJF 2005, no. 36, p. 1175.

³⁰ Judgment of the CAA in Paris from 25 March 2010, no. 08PA03658, *SARL A la Fregate*, *Revue du droit fiscal* 2010, no. 36, p. 55.

³¹ GOGUEL, F. La garantie contre le changement de doctrine face au droit communautaire. *Droit fiscal* 2006, no. 21–22, item. 1026 ff.; GUICHARD, M. – GRAU, R. La doctrine administrative contraire au droit de l'UE est opposable. Note. *Revue du droit fiscal* 2010, no. 36, pp. 57–60.

³² Art. 34 (9) of regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (*OJ L* 269, 10.10.2013, p. 1–101).

7. TAX RULING AS PUBLIC AID - TRIAL TIME FOR TAX RULINGS

The previously mentioned mechanism of harmful tax competition, of which among others Ireland and Luxembourg³³ were accused, consisted of two “layers”. The first one was, of course, the very action that allowed e.g. transfer of income to a “friendly” tax jurisdiction. The taxpayer, however, strove to make his or her action safe. If the taxpayer was ready to bear the risk, he or she would probably benefit from less sophisticated ways of reducing the tax burden, i.e. not tax avoidance, but tax evasion or tax fraud. And it was precisely the obtaining of a tax ruling that was to provide security for the taxpayer (second layer).

In theory, everything should – from the taxpayer’s point of view – work well. The protection of the owner of a tax ruling is an inherent element of tax ruling. The essence of protection is that it is used when the ruling turns out to be defective, i.e. illegal. Most importantly, in principle, such protection is in line with the general principles of EU law. Without challenging the tax ruling, harmful tax competition could not be combated effectively.

The European Commission has used the regulation on unlawful state aid to combat fraudulent activities by Member States. According to the CJEU case law “*a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than that of other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (judgment of 15 March 1994, Banco Exterior de España, C387/92, EU:C:1994:100, paragraph 14; see, also, judgment of 8 September 2011, Paint Graphos and Others, C78/08 to C80/08, EU:C:2011:550, paragraph 46 and the case-law cited)*”.³⁴

Importantly, in the case of state aid, there is a strict rule that illegal state aid must be repaid. In this case, the protection of an individual’s legitimate expectations from the State cannot apply. This is due to the fact that, by its very nature, public aid is granted by the state, so the protection of an individual’s trust in the state would always make it impossible to recover the state aid granted. A ban on granting state aid would therefore be ineffective.

The decisions of the European Commission to impose an obligation to return state aid are gradually reaching the General Court. The Court’s decisions³⁵ vary in substance,³⁶ but the court’s reasoning is similar. The Court examines only whether state

³³ More on the issue, see, e.g.: *Harmful Tax Practices – 2017 Progress Report on Preferential Regimes, Inclusive Framework on BEPS: Action 5*, OECD (report from 16 October 2017).

³⁴ Point 145 of judgment of the General Court of 24 September 2019 in cases T 760/15 and T 636/16, Kingdom of the Netherlands v. Starbucks Corp., established in Seattle, Washington (United States), Starbucks Manufacturing Emea BV, established in Amsterdam (Netherlands), ECLI:EU:T:2019:669

³⁵ Judgment of the General Court of 24 September 2019 in cases T 760/15 and T 636/16, Kingdom of the Netherlands, Starbucks Corp., Starbucks Manufacturing Emea BV, ECLI:EU:T:2019:669; Judgment of the General Court of 24 September 2019 in cases T755/15 and T759/15, Grand Duchy of Luxembourg I Fiat Chrysler Finance Europe, ECLI:EU:T:2019:670.

³⁶ In the Starbucks case, the Court upheld the appeal and in the FIAT case, it dismissed the appeal and acknowledged the European Commission’s view.

aid is involved; it is usually particularly important to determine whether it is possible to determine the “selectivity of the advantage granted to the taxpayer”. The issue of protection resulting from the tax ruling is actually outside the scope of the court’s interest: the tax ruling is ignored.

Simply obtaining a tax ruling does not constitute state aid.³⁷ State aid is rather an incorrect interpretation of the law in the tax ruling, or a hidden agreement between the taxpayer and the state that creates a favourable tax regime.³⁸

Thus, the protective function of tax rulings has been significantly weakened. A tax ruling does not guarantee safety for the taxpayer.

EU actions may have influenced changes in the scope of protection of ruling owners in other countries. In Poland, a tax ruling does not protect an entity to whose actions e.g. General Anti-Avoidance Rule will apply.³⁹ Combating tax avoidance takes precedence over the protection of taxpayers’ legitimate expectations. The “spirit of BEPS” can be clearly seen here.

8. TRANSPARENCY OF TAX RULINGS

Undoubtedly, the key changes concerning tax rulings are related to ensuring their transparency. Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation⁴⁰ introduced an obligation to exchange information on rulings with cross-border effect. This has given the EC knowledge of Member States’ tax practices. This fact alone must prompt Member States to be particularly careful when trying to encourage investors to invest in their territories. It is becoming risky to use tax rulings to create a favourable tax regime for a particular investor. The mutual exchange of tax rulings can facilitate the detection of taxpayers’ actions, which can be described as tax avoidance. Individual elements of sometimes complex economic operations that are carried out in one country may seem completely tax-neutral. It is only by learning the picture of the whole that international or national anti-abuse clauses can be applied.

Of course, this directive must be seen in the context of global trends. It is difficult to separate EU activities from the BEPS project. As a result, other countries are also changing their policy on the exchange of information on tax interpretations. The case of Switzerland is particularly significant here, as it used to be treated as a discreet place for the safe investment of capital. Nowadays, the discretion of Swiss banks survives only in old films, and even the tax authorities are increasingly willing to cooperate with other countries to combat tax avoidance.

Switzerland has made reservations to Articles 25 and 26 of the OECD Model Convention, which limited the exchange of information to that which was necessary for the

³⁷ More on the issue, see: LUJA, R. H. C. Will the EU’s State Aid Regime Survive BEPS? *British Tax Review*, 2015, No. 3, pp. 379–390.

³⁸ LANG, M. Tax ruling and State Aid Law. *British Tax Review*, 2015, No. 3, p. 395.

³⁹ Art. 14na of the Act of 29 August 1997. Tax ordinance.

⁴⁰ OJ L 332, 18. 12. 2015, p. 1–10.

application of the agreement.⁴¹ This stemmed from the view that DTCs do not combat tax evasion, but only avoid double taxation.⁴² The exchange of information could in principle only take place in the case of tax fraud, which is an illegal activity that is subject to criminal liability, and not in the case of tax evasion, which is not subject to criminal liability.⁴³ In 2009 there was a change in the attitude of the Swiss authorities. Under the new agreements concluded by Switzerland, the exchange of information will not be associated with whether it is a case of tax fraud or tax evasion.⁴⁴ It is interesting to note that the Swiss authorities have confirmed that tax rulings can generally be treated as information within the meaning of Article 26 of the OECD Model Convention.⁴⁵

Transparency is also fostered by the development of procedures for issuing tax rulings. The transparency of the system of issuing tax interpretations is to ensure its fairness. The example of Luxembourg is a significant one. At the time of LuxLeaks, the issuing of tax rulings was not regulated at all. Nowadays, the issuing of interpretations in this country is subject to precise procedural regulations,⁴⁶ which also entail the introduction of fees for their issuance.⁴⁷ Luxembourg is no exception. A similar tendency to regulate the mode of issuing interpretations and their legal value was already visible, in among other nations, nearby France.⁴⁸ Thus, the procedure for issuing tax rulings ceases to be a non-formalized sequence of negotiations. This is not a bad trend.

9. WILL ADVANCE TAX RULINGS SURVIVE?

Until a few years ago, one could have had doubts as to whether tax rulings would not be “destroyed” to a significant extent as an instrument to protect the taxpayer’s legal security. Nowadays, it can be considered that their legal value is certainly falling. More and more often, there are exceptions to the rule that the owner of a tax ruling can rely on it. However, these exceptions usually apply when abuse of this instrument has taken place.

The current changes are moving towards restoring the original function of the taxpayer’s interest protection instrument to tax rulings. Tax ruling is therefore no longer a shield to protect the “shady” interests of taxpayers and sometimes of states.

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⁴¹ OBRIST, T. – HONGLER, P. The Swiss Tax Ruling Procedure: Interplay with Exchange of Information Requests. *European Taxation* 2012, Vol. 52, No 10, p. 496.

⁴² Clause 27.9 of the commentary to article 1 of the OECD Model Convention.

⁴³ OBRIST, T. – HONGLER, P. *The Swiss Tax Ruling Procedure*..., p. 496.

⁴⁴ Ibidem, p. 497.

⁴⁵ Ibidem, p. 498.

⁴⁶ MISCHO, P. – KERGER, F., *After “LuxLeaks: Welcome Changes to Luxembourg’s Tax Rulings Practice*, Tax Analysts 2015, pp. 1197–1201.

⁴⁷ From EUR 3000 to 10 000.

⁴⁸ MORAWSKI, W. *Interpretacje prawa podatkowego i celnego*. Warszawa: Wolters Kluwer 2012, pp. 346–364.