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International Exchange of Information on Rulings

by

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I. Introduction

The idea that rulings, namely specific determinations from a tax administration in favor of a taxpayer about the tax treatment of a transaction, could lead to harmful tax practice, notably because of lack of transparency, can be traced back to the OECD 1998 Report on Harmful tax competition[1]. Following the 1998 Report, the Forum on Harmful Tax Practices (FHTP) continued its efforts to analyze ruling practices among member States and to issue some guidance in this context.

Indeed, in a Consolidated Note, published in 2004 by the OECD, Chapter 5 defines a methodology that should help to determine whether a ruling regime would fall into the key factors of harmful tax competition[2]. In order to determine whether a preferential regime is potentially harmful, four key factors have been developed by the OECD, namely: (a) the regime imposes no or low effective tax rates; (b) ring fencing; (c) lack of transparency; (d) no effective exchange of information.[3] An additional list of eight other factors have also been identified, in order to help to spell out in more details some of the key principles and assumptions that have to be applied to the key factors[4]. It should be reminded that, as a « gateway principle », in order for a regime to be considered as potentially harmful, the first key factor « no or low effective tax rate » must apply.

1 OECD Harmful Tax Competition, An Emerging Global Issue 1998; see in particular page 28.
2 OECD, Consolidated Application Note - Guidance in applying the 1998 Report to Preferential Tax Regimes, 2004, p. 47 ff.
3 OECD Consolidated Application Note, 2004, chapter 5, p. 47.
4 BEPS Action 5 Final Report 2015, p. 20.

The impetus in favor of developing an effective exchange of information on rulings, in the context of preferential regimes and in favor of transparency started to emerge and materialize under the BEPS project, as of 2013[5]. Within the framework of the fight against base erosion and profit shifting, the OCDE has developed an Action Plan designed to help governments, which "have to cope with less revenue and a higher cost to insure compliance"[6].

The Action Plan is divided into 15 different actions. In particular, Action 5 of the BEPS project commits the FHTP to "revamp the work on harmful tax practices with a priority on improving transparence, including compulsory spontaneous exchange of information on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime"[7]. The first priority focuses on substantial activity requirement and on the so-called « nexus approach ». The development of a framework for exchange of information on rulings is part of the second priority under Action 5, namely to improve transparency,

As a result, on October 2015, a Final Report on Action 5 "Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance" (hereafter BEPS Action 5 Final Report), has been published. Chapter 5 of this report provides for a framework for improving transparency in relation to rulings and introduces a mandatory *spontaneous* exchange of information on rulings. The Final Report supersedes an initial Progress Report of the FHTP of 2014 (hereafter BEPS Action 5 Progress Report).

At the same time, the EU also worked on a mechanism to exchange ruling within the EU. In parallel to the BEPS project, the EU has agreed, on 8 December 2015, to modify its Directive on Administrative Assistance (hereafter New DAC or EU Rulings Directive) (2011/16/EU)[8] and to even go further than the OECD project, so as to introduce a mandatory *automatic* exchange of information with regard to rulings[9].

While the two projects seem to pursue the same goal, the scope and measures chosen differ. We will therefore describe, in a comparative perspective, the OECD BEPS system (hereafter III.) and the EU Rulings Di-

5 OECD, Action Plan on Base erosion and Profit Shifting 2014.
6 BEPS Action plan 2013, p. 8.
7 BEPS Action plan 2013, p. 18.
8 Council Directive 2011/16/EU of 15 February on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ 64 of 11.3.2011, p. 1.
9 Proposal for a Council Directive amending Directive 2011/16/UE as regards mandatory automatic exchange of information in the field of taxation, adopted on 8 December 2015.

rective model (hereafter IV.). Finally, the impact of these models for Switzerland will be analyzed (hereafter V.). At the outset, it is worth trying to give a more precise definition of the concept of ruling (hereafter II.).

II. Rulings in general

Rulings, in general, can be defined as an advance determination by the competent tax administration on the tax treatment of a transaction[10].

More precisely, rulings are « any advice, information or undertakings provided by a tax authority to a specific taxpayer or a group of taxpayers concerning their tax situation and on which they are entitled to rely »[11].

They are different categories of rulings. Ruling can be « *taxpayer specific* », in the sense that they apply to a specific taxpayer, or *general*, i.e. they apply to a group of taxpayers, or are given in relation to a set of circumstances[12]. Rulings can be *pre or post* transactions, but in each case as a response to a request by the taxpayer[13]. However, ruling are generally not regarded as formal decisions, they are merely a determination or information by the tax administration. This implies that usually, rulings are not as such subject to appeal.

In practice, a taxpayer will request a determination by the tax administration, based on particular facts patterns. In accordance with the relevant legislation, after analysis of the facts, and sometimes discussions with the taxpayer, the tax administration may then confirm its position on the tax consequences of the described transaction. Based on the applicable rule of law in the relevant country, typically under a good faith principle, the taxpayer is entitled to rely on the position of the tax administration, subject to a proper description of the facts and implementation of the conditions of the ruling by the taxpayer[14]. For instance, under Swiss law, rulings, provided these conditions are

10 See, among others, NIEDERER/DUBACH, Private Tax Rulings in Switzerland, p. 228; BÜRGISSER, Du ruling fiscal, p. 401; SCHREIBER/JAUN/KOBIERSKI, Steuerruling – Eine systematische Auslegeordnung unter Berücksichtigung der Praxis, p. 293 ff; BEUSCH, Zulässigkeit und Wirkungen von Verständigungen (Ruling), p. 4 ff.

11 BEPS Action 5 Final Report, p. 47, n. 95.

12 BEPS Action 5 Final Report, p. 47s, n. 97, 102.

13 BEPS Action 5 Final Report, p. 47, n. 97.

14 BEPS Action 5 Final Report, p. 47.

met, rulings are protected under the Constitutional principle of good faith, guaranteed under Art. 9 of the Swiss Federal Constitution[15].

Rulings are not necessarily problematic and potentially harmful. Both the OECD and the EU recognize that issuance of advance tax rulings facilitate the consistent and transparent application of the laws and provide certainty for business and clarification of tax law for taxpayers[16]. The FHTP also admits that rulings are a « useful tool for both tax administrations and taxpayers, providing for certainty and predictability and thus avoiding tax disputes from even arising ...»[17]. However, rulings pertaining to aggressive planning structures or «tax-driven structures[18] » can lead to an artificial low level of taxation. In addition, taxpayer-specific rulings are usually not published and bear some concerns due to the lack of transparency of the process and determination.

Both the OECD, under the BEPS Action 5, and the EU, in the New DAC on automatic exchange of information on rulings, have therefore developed a framework to develop exchange of information on specific rulings, falling into the scope of the harmful tax practice, lacking transparency or raising BEPS concerns.

III. BEPS (Action 5) Compulsory spontaneous exchange of information on rulings

1. In general

The work of the FHTP can be seen as a follow-up to the 1998 OECD Report on Harmful Tax Competition. Here, the concern remains the same, even if it focuses less about "traditional ring-fencing but instead relate to across the board corporate tax rate reductions on particular types of income (such as income form financial activities or from the provision of intangible)"[19]. It should be stressed that the work on harmful tax practices is « not intended to

15 OBERSON, Droit fiscal suisse, p. 574; Swiss Federal Supreme Court, 2C-664/2013, 28 April 2014, cons. 4.2; 1C-269/2013, 10 December 2013, cons. 4.2.

16 See Directive amending Directive 2011/16 as regards mandatory automatic exchange of information in the field of taxation (hereafter EU Rulings Directive), recital (1).

17 BEPS Action 5 Final Report, p. 46, n. 92.

18 EU Rulings Directive, recital (1).

19 BEPS Action 5 Final Report, p. 12, n. 3.

promote the harmonization of income taxes or tax structures within or outside the OECD, nor is it about dictating to any country what should be the appropriate level of tax rates »[20]. The purpose is to reduce the distortionary influence of taxation on the location of mobile financial and services activities, and as a result encourage « free and fair tax competition »[21].

Under Action 5 of the BEPS Project, the FHTP has to deliver 3 outputs, (1) finalization of the review of countries preferential regimes; (2) a strategy to expand participation to third countries; (3) consideration of revisions or additions to the existing framework[22]. The Action 5 Final Report focuses on the substantial activity requirement for any preferential regime (chapter 4) and on improving transparency in relation to rulings (chapter 5). In particular, chapter 5 provides for a compulsory spontaneous exchange of information on certain rulings[23]. We will then focus on this particular aspect.

2. Development of a framework for spontaneous exchanges on rulings

The FHTP had decided to take forward the work on improving transparency in three steps[24]. The *first* step aims at developing a framework for compulsory exchange of information on rulings. The framework, first developed in the 2014 Progress Report, has been modified and broadened in the Final Report. This framework will also be dynamic and flexible.

In the *second* step, the FHTP has considered ruling regimes in the OECD and associated countries and the extent of exchange of information. The initial approach set up in the progress Report has been modified in the sense that the exchange of information on rulings should generally "cover all instances in which the absence of exchange of a ruling may give rise to BEPS concerns"[25]. The Final Report now makes it clear that exchange of information will not be limited to rulings related to preferential regimes.

In the *third* step, the FHTP developed a general best practice framework for the design and operation of rulings.

[20] BEPS Action 5 Final Report, p. 11, n. 3.
[21] BEPS Action 5 Final Report, p. 11, n. 3.
[22] BEPS Action 5 Final Report, p. 12.
[23] BEPS Action 5 Final Report, p. 45 ff.
[24] BEPS Action 5 Final Report, p. 45, n. 90.
[25] BEPS Action 5 Final Report, p. 45, n. 90b).

3. Definition of rulings in the scope

A. In general

Rulings are "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"[26]. As already mentioned, the framework recognizes that rulings are a useful tool for both tax administrations and taxpayers, providing for certainty and predictability. However, rulings can also be used to "attract intentionally mobile capital to a jurisdiction and they have the potential to do this in a manner that contributes to, or constitutes, a harmful tax practice"[27]. It is not the ruling as such which is problematic but the content of it and the lack of transparency of the determination which it contains.

While the definition is wide, the framework for compulsory spontaneous exchange of information only applies to *taxpayer-specific rulings*, which apply to a specific taxpayer and on which that taxpayer is entitled to rely. As already mentioned, rulings may be given before or after a transaction, but rulings issued within an audit carried out after a taxpayer are excluded. It however does not exclude that a ruling could be issued, after an audit, covering future facts. This situation would thus not exclude in our view such ruling to be in the scope[28].

More precisely, the Report identifies various forms of taxpayer-specific rulings:

- Advance tax rulings (ATRs), which are specific to an individual taxpayer and provide for a determination of the tax consequences of a proposed transaction on which the taxpayer is entitled to rely.
- Advance pricing arrangements (APAs) defined as "an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria ... for the determination of the transfer pricing for those transactions over a period of time"[29]. APAs differ from "classical" rulings, in that they require a detailed review and verification of the factual assumptions on which the determination of legal con-

[26] BEPS Action 5 Final Report, p. 47, n. 95; see also CAN, p. 47.
[27] BEPS Action 5 Final Report, p. 47.
[28] In this sense, BEPS Action 5 Final Report, p. 47, n. 97.
[29] BEPS Action 5 Final Report, p. 48, n. 99.

sequences is based[30]. APAs may be unilateral, bilateral or multilateral.

By contrast, the framework does not apply to *general rulings*, which apply to groups or types of taxpayers or may be given in a set of circumstances. However, the best practices do apply these rulings[31].

The framework now applies to six categories of taxpayer-specific ruling, which in the absence of compulsory spontaneous exchange of information could give rise to BEPS concern, namely: (i) rulings related to preferential regimes; (ii) unilateral APA; (iii) cross-border rulings providing of a downward adjustment of taxable profits; (iv) permanent establishment (PE) rulings; (v) related party conduit rulings; and (vi) any other type of rulings agreed by the FHTP that in the absence of exchange of information give rise to BEPS concerns[32].

The framework seeks to find a balance between ensuring that the information exchanged is relevant to other tax administration and does not impose unnecessary administrative burden. The framework builds on the guidance contained in the OECD Consolidated Application Note (CAN) of 2004 and also on the Convention on Mutual Administrative Assistance in Tax Matters (CMMAT) and on the EU DAC (2011/16)[33]. These sources have in common that they encourage spontaneous exchange of information in circumstances "where it is assumed that information obtained by one country will be of interest to another country"[34].

B. The filter approach of the BEPS Progress Report (2014)

In the Progress Report of 2014, in order to determine when rulings should be exchanged, the framework developed a *filter approach* (see flowchart on annex A). The purpose of this approach is to reduce the "level of discretion" that could have been used by the tax administration to determine the scope of application. The first 3 filters are normal filters that apply to identify situation in which an analysis of the four key factors and other factors of the

30 BEPS Action 5 Final Report, p. 48, n. 100.
31 See infra I.
32 BEPS Action 5 Final Report, p. 46.
33 BEPS Action 5 Final Report, p. 46, n. 92.
34 BEPS Action 5 Final Report, p. 46.

OECD 1998 Report are necessary in order to identify a potentially harmful regime[35]. Indeed, the first three filters limit the obligation to spontaneously exchange information to rulings related to (1) preferential regimes that (2) are within the scope of the FHTP work and (3) meet the no or low effective tax rate factor. If all these three tests are passed, then additional filters do apply to target rulings relevant for the spontaneous exchange, namely, (4) if the ruling is a taxpayer-specific ruling related to the first three regimes, and (5) if the taxpayer-specific ruling is in the area of transfer pricing or another ruling[36].

According to the filter 5, if it is a *transfer pricing* ruling, according to *Filter 5(a),* it should further be determined whether the ruling is a unilateral transfer pricing ruling, or a bilateral or multilateral APA. Transfer pricing rulings includes APAs (whether unilateral, bilateral or multilateral) and ATR on transfer pricing. In principle, obligation to exchange information covers these types of rulings. However, if the APA covers only *domestic* transactions, the obligation to spontaneous exchange would not occur in the absence of an affected country[37].

If the ruling is *another ruling* then, according to *Filter 5(b),* it should further be determined whether it covers, either an (i) inbound investment *into* the country in which the taxpayer has obtained the ruling, or an ii) outbound investment *from* that country, or (iii) transactions or situation involving other countries. In these three alternatives, spontaneous exchange is required[38].

C. BEPS Final Report of 2015

In the context of the BEPS Progress Report, the FHTP has confirmed the so-called filter approach but only on rulings related to *preferential regimes*. The Final Report, however, not only covers rulings related to a preferential regime but, more generally, **six categories** or taxpayer-specific rulings which, in the absence of compulsory spontaneous exchange of information, could give rise to BEPS concerns[39]. The 2014 Progress Report has thus been modified in this respect and is now *superseded* by the Final Report of 2015.

35 BEPS Action 5 Progress Report 2014, p. 39.
36 BEPS Action 5 Progress Report 2014, p. 40 ff.
37 BEPS Action 5 Progress Report 2014, p. 43.
38 BEPS Action 5 Progress Report 2014, p. 44.
39 BEPS Action 5 Final Report, p. 46, n. 91.

4. Rulings covered by the spontaneous exchange framework

A. Taxpayer-specific rulings related to preferential regimes

As discussed above, the BEPS Final Report has taken up the framework described in the FHTP Progress Report of 2014. The filter approach applies here. There is therefore an obligation to spontaneously exchange rulings related to regimes that (i) are within the scope of the work of the FHTO; (ii) are preferential and (iii) meet the low or no effective tax rate factor[40].

B. Cross-border unilateral APAs and any other cross-border unilateral tax rulings covering transfer pricing or the application of transfer pricing principles

Unilateral APAs and other cross-border unilateral tax rulings, such as ATRs covering transfer pricing, are also in the scope. Other cross-border rulings in the area of transfer pricing are relevant because they may cover issues that go beyond an APA, such as legal issues, or may deal with a specific transaction[41]. It should be stressed that these types or rulings are relevant, not because they are preferential but because, in the absence of transparency, they can create distortion and may give rise to BEPS concerns[42].

The obligation to spontaneously exchange information on these types of rulings is also linked with the transfer pricing documentation required under Action Plan 13[43]. Indeed, the master file will contain a list and brief description of the MNE existing unilateral APAs and other rulings relating to the allocation of income among countries. The obligation to spontaneously exchange on unilateral APAs and other transfer pricing rulings could however cover a wider range of rulings on transfer pricing than those in the local file or the master file[44]. In addition, these two sets of obligations, stemming from Action 13 and Action 5, are "mutually reinforcing, allowing tax administration to cross-check the information reported by taxpayers against the information exchanged from another tax administration and vice versa"[45].

[40] BEPS Action 5 Final Report, p. 48.
[41] BEPS Action 5 Final Report, p. 49, n. 108.
[42] BEPS Action 5 Final Report, p. 49, n. 109.
[43] BEPS Action 5 Final Report, p. 49, n. 110; BEPS, Action Plan 13, p. 3 ff.
[44] BEPS Action 5 Final Report, p. 50, n. 111.

C. Cross-border rulings providing for a unilateral downward adjustment to the taxpayer's taxable profits that is not directly reflected in the taxpayer's financial account

Cross-border rulings providing for a downward adjustment not directly reflected in the taxpayer's financial account have already been identified as examples of lack of transparency where the tax authority does not notify the other tax authority of the existence of the ruling[46]. These types of rulings typically concern so-called informal capital rulings, and other similar ruling where a "contribution of capital or an asset, generally by the parent company or another related party, and provide an adjustment that reduces the taxable profits, for instance through a deemed interest deduction in the case of an interest free loan"[47].

D. Permanent establishment (PE) rulings

PE rulings covered are rulings concerning the existence or absence of the PE, and/or the attribution of profits to a PE by the country giving the ruling[48].

E. Related party conduit rulings

These rulings concern arrangements involving cross-border flows of funds through an entity, sited in the country giving the ruling, where the funds flow, directly or indirectly to another country.

[45] BEPS Action 5 Final Report, p. 50, n. 112.
[46] BEPS Action 5 Final Report, p. 50, n. 113.
[47] BEPS Action 5 Final Report, p. 50, n. 115.
[48] BEPS Action 5 Final Report, p. 51.

F. Any other type of rulings that in absence of exchange would give rise to BEPS concern

This category is a catch-up clause. It refers to any other ruling that could give rise to concern in absence of exchange of information. This clause therefore provides for a flexible solution to include in the future other types of rulings, but subject to the approval of the FHTP[49].

5. Jurisdictions receiving the information

In general, exchange of information on rulings for the six categories will occur with: (i) the country of residence of all related parties with which the taxpayer enters into a transaction for which a ruling is granted or which give rise to income from related parties benefiting from a preferential treatment and (ii) the residence country of the ultimate parent company and the immediate parent company[50].

This so-called two-part rule will apply in most cases, notably for the following regimes: shipping company, banking, insurance, financing and leasing, fund management, headquarters, distribution center, service center, IP, holding company, and other miscellaneous regimes identified as preferential by the FHTP[51]. The same two parts rules also apply for cross-border unilateral APAs and cross-border unilateral rulings and cross-border rulings providing for a downward adjustment. For PE rulings the information is exchanged with the residence country of the head office, or the country of the PE, and the residence country of the ultimate parent company and the immediate parent company[52]. For conduit rulings, the information is exchanged with (i) the country of residence of any related party making the payments to the conduit (ii) the country of residence of the ultimate beneficial owner and (iii) to the extent not covered by (ii) the residence country of the ultimate parent company and the immediate parent company. The related party threshold – subject to review by the FHTP – has been set at 25%.

Table 5.1 summarizes the country with which information should be exchanged.

[49] BEPS Action 5 Final Report, p. 51, n. 120.
[50] BEPS Action 5 Final Report, p. 52, n. 121.
[51] BEPS Action 5 Final Report, p. 52, n. 123.
[52] BEPS Action 5 Final Report, p. 52, n. 124.

6. Information subject to exchange

In order to find a balance between the need for greater transparency, on the one hand, and the desire not to place too much administrative burden on the administration, on the other hand, a **two-step process** has been agreed.

Under the first step, a tax administration provides a summary and some basic information on the rulings[53]. This exchange will rely on a template which requires, at least the following information : identification of the taxpayer and where appropriate the group to which it belongs; date of issuance of ruling, accounting periods and tax years covered, type of rulings (according to the five first categories)[54]. This process is design to create minimal extra burden, while serving as a filter, on the basis of which the receiving tax administration can determine whether to request the ruling itself, in a second step[55]. In our view, the exchange of the ruling as such is still subject to the condition that such exchange pertains to information, which are "foreseeably relevant", according to the general condition of exchange of information upon request[56].

The implementation will be *monitored* by the FHTP. As explained in the Report, "an ongoing monitoring and review process mechanism will be put in place to ensure countries' compliance with the obligation to spontaneously exchange information under the framework.[57]"

7. Application of the framework

A. Legal basis

An international instrument is required. There are numerous instruments on the basis of which spontaneous information may take place, notably: relevant bilateral information exchange instruments; international instruments designed specifically, such as the CMAAT, and in the EU, the DAC 2011/16/EU. Under the CMAAT, the legal basis is Article 7.

[53] BEPS Action 5 Final Report, p. 54, n. 130.
[54] See Annex C of BEPS Action 5 Final Report.
[55] BEPS, Action 5 Final Report, p. 54, n. 131.
[56] The EU Rulings Directive seems to follow the same line; see *infra* text accompanying footnote 74.
[57] BEPS Action 5 Final Report, p. 67s.

Countries that do not have the necessary legal instrument in force will need to consider putting such framework in place. Revision of existing instruments, including DTT, TIEA, etc. is also possible.

B. Timeline

In general, the countries should start to implement rules for spontaneous exchange of information of *future* ruling, as of 1 April 2016, and countries have until the end of 2016 to exchange information on *past* rulings[58]. However countries that do not have currently the necessary legal framework in place for such exchange will need to put it in place. In such cases, the timeline provided under the BEPS Report is "subject to the country' legal framework"[59].

Past rulings, are ruling that have been issued on or after 1 January 2010 and were still in effect as from 1 January 2014. If the ruling does not contain sufficient information to enable identification of all the relevant countries with which information needs to be exchanged, the country is not expected to contact the taxpayer but can use "best efforts" to identify the countries with which to exchange information on the ruling.

Future rulings are those issued on or after 1 April 2016. For future rulings, countries are required "to take the necessary measures to ensure they have, or are able to obtain, information that identifies the countries they must exchange with"[60]. For that purpose, this may imply that countries may need to modify their ruling practices.

C. Methods of exchange

For *future* rulings, exchange must take pace "as quickly as possible" and no later than 3 months after that in which the ruling becomes available to the competent authority of the country that has granted the ruling. The recommendation is that the relevant authorities within the country that has granted the ruling transmit that ruling to their competent authority without undue delay. For past rulings, however, they also must be exchanged but countries

58 BEPS Action 5 Final Report, p. 67.
59 BEPS Action 5 Final Report, p. 59, FN 11 and 13.
60 BEPS Action 5 Final Report, p. 54, n. 129.

can apply a phased approach, as long as the process is completed by the end of 2016[61].

D. Reciprocity

While there are benefits associated with a reciprocal approach to exchange of information, the benefits do not appear relevant where the system of only one country provides for a specific procedure[62]. In this case, a country that has granted a ruling that is caught by the obligation to spontaneously exchange information cannot invoke the lack of reciprocity as an argument for not spontaneously exchanging information[63].

8. Confidentiality of the information exchanged

Countries exchanging information and the taxpayers involved have the right to expect that information exchanged remains confidential[64].

In fact, the confidentiality rules provided for in the international legal basis for information exchange will apply. This is notably the case of art. 22 of the CMMAT or art. 26 par. 2 of the OECD Model DTT[65]. In addition, these rules also confirm that information exchanged may only be used only for specific purpose and disclosed to the specific person mentioned[66].

A. Best practices

In order to reinforce the transparency advancements made in this framework, Action 5 provides for best practices, that are applicable to both general and specific cross-border rulings, except where appropriate distinctions are made between taxpayer specific, APAs and general rulings[67].

61 BEPS Action 5 Final Report, p. 55, n. 135, subject however to the legal framework implementation in the relevant country, see p. 5 FN 11 and 13.
62 BEPS Action 5 Final Report, p. 55.
63 BEPS Action 5 Final Report, p. 55.
64 BEPS Action 5 Final Report, p. 55.
65 For more details, see OBERSON, International Exchange of Information in Tax Matters. Towards Global transparency, p. 24 ff, 69 ff.
66 BEPS Action 5 Final Report, p. 56.
67 BEPS Action 5 Final Report, p. 56.

These practices apply (i) for the *granting of a ruling* (notably duty to identify and publish administrative procedure for rulings; respect to relevant domestic tax law and administrative procedure; respect of international obligations; issuance in writing; competence of the authority; (ii) for the *term of the ruling and subsequent audit* (notably duty of the taxpayer to notify any material changes in the facts and circumstances; effective periodical administrative procedures to verify facts and assumptions made; possibility to revise or change rulings if misrepresentation by the taxpayer, change of relevant laws or significant change of facts or assumptions made); (ii) *publication and exchange of information* (general ruling should be published and made easily accessible to other tax administration and taxpayers; taxpayer specific ruling falling in the scope of the spontaneous exchange should be transmitted "without undue delay".

IV. Automatic exchange of information on rulings in the EU

1. Introduction

Following the trend against harmful tax competition, launched by the OECD in 1998, and also implemented in the EU Code of conduct, the EU has also pursued its efforts in the fight against cross-border tax avoidance, aggressive tax planning and harmful tax competition, in parallel to the BEPS program. Already in 2012, the Code of Conduct Group for Business Taxation has reviewed some procedures of tax rulings in the Member States and recommended the development of a "Model Instruction"[68]. In addition, it appeared that some of the investigations led by the EU Commission whether some harmful tax regimes could constitute a state aid, within the meaning of art. 107 of the Treaty on the Functioning of the European Union, have been also focusing on tax rulings[69]. The so-called "*Lux leaks*" scandal of 2014 has also demonstrated that the use of tax rulings could raise issues of harmful tax competition or State aid.

68 EU Commission, Explanatory Memorandum to the Proposal for the EU Rulings Directive, COM(2015) 135 final, p. 4; Document 10903/12 FISC 77.

69 See VANISTENDAEL, Automatic Exchange of Tax Rulings in the EU, p. 261 ff, 262; LANG, Tax Rulings and State Aid Law, p. 391.

As a response to these developments, the EU has adopted, on 8 December 2015, a modification of the Directive on Administrative Cooperation (DAC), requiring automatic exchange of information on tax rulings[70]. Under the EU Rulings Directive, Member States will be required to automatically exchange to the Commission and all other Member States information on cross-border advance tax rulings and advance transfer pricing arrangements. The proposal is based on the principle that it is the receiving Member States which are "are best placed to assess the potential impact and relevance of such rulings, rather than the Member State giving the ruling"[71].

Prior to this recent change, the DAC only provided a system of automatic exchange on specific types of income and wealth but not on rulings (see art. 8 DAC). It also includes a mandatory spontaneous exchange of information between Member States in five specific cases. In particular, under art. 9 par. 1 DAC, such spontaneous exchange applies in cases where the competent authority of a Member Stats "has grounds for supposing that there may be a loss of tax in another Member States". This spontaneous exchange could already apply to rulings that a Member State issues, amend or renews to a specific taxpayers, if the conditions of art. 9 DAC are met[72]. Such exchange is however hindered by important practical difficulties, notably the discretion permitted to the issuing Member State to decide which other Member State should be informed[73]. As a consequence, the DAC has been modified.

2. Rulings in the scope

The New DAC will apply both to advance cross-border rulings and advance pricing agreements. It provides for a definition of both advance cross-border rulings and APAs.

Advance cross-border rulings are « any agreements, communication or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit », and which meets the following conditions : (a) is issued by the government or the tax authority of one or

70 Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

71 See EU Commission, Explanatory Memorandum to the Proposal for the EU Rulings Directive, COM(2015) 135 final, p. 2.

72 EU Rulings Directive 2015, recital (3).

73 EU Rulings Directive, recital (4)

more Member State; (b) is issued to a particular person or a group of person, which is entitled to rely on; (c) concerns the interpretation or application of a legal or administrative provision concerning the administration or enforcement of national tax laws of a Member State; (d) relates to a cross-border transaction or the question of whether or not activities carried on by a person in another jurisdiction create a permanent establishment; and (e) is made in advance of the transactions or of the activities in another jurisdiction potentially creating a permanent establishment or of the filing of a tax return covering the period in which the transaction or series of transactions or activities took place (new Art. 3 point 14).

Advance pricing arrangements mean any agreement, communication or other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which meets the following conditions: (a) is issued by the government or the tax authority of one or more Member State; (b) is issued to a particular person or a group of persons, which is entitled to rely on; and (c) determine in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment (new Art. 3 point 15).

Despite these definitions, the New DAC provides for room for interpretation, in the sense that these definitions should be « sufficiently broad to cover a wide range of situations, including but not limited to »: unilateral, bilateral or multilateral APAs and decisions; arrangement or decisions determining existence of a permanent establishments, or of facts with a potential impact of the tax base of the permanent establishment, arrangements or decisions determining the tax status of a hybrid entity, as well as arrangement or decisions on assessment basis for depreciation of an asset in one Member State that is acquired from a group company in another jurisdiction[74].

[74] EU Rulings Directive, recital (6).

3. Automatic exchange

A. Scope and conditions of mandatory automatic exchange

The Directive provides for mandatory automatic exchange of *information* on **advance cross-border ruling** and **advance pricing arrangements** to the EU Commission and all Member states, under a standardized form, and in accordance with applicable practical arrangements, which will be adopted (new art. 8a par. 1).

Under the rule of Art. 8a par. 1, the communication of information should take place for the cross-border ruling or advance pricing agreement issued, amended or renewed **after 31 December 2016**. The exchange of information will then take place within three months following the end of the half of the calendar year during which the advance cross-border ruling or advance pricing arrangement have been issued, amended or renewed (new Art. 8a par. 4).

Cross-border rulings or APAs issued, amended or renewed within a period of **five years before 1 January 2017**, such communication should also occur, under the following principles (new Art. 8a par. 2):

- For rulings issued, amended or renewed between 1 January 2012 and 31 December 2013, the communication will take place in case the rulings were still valid on 1 January 2014.
- For rulings issued, amended or renewed between 1 January 2014 and 31 December 2016, the communication will take place irrespective of whether they are still valid.

Member States may however exclude from communication, information on advance cross-border rulings and APAs, referred to under new Art. 8a par. 2, issued, amended or renewed to a particular person or a group of persons with a group wide annual net turnover of less than 40 million EUR in the fiscal year preceding the date of issuance, amendment or renewal (new Art. 8a par. 2). In that case, exchange of information will take place before 1 January 2018 (new Art. 8a par. 5 lit. b). This rule could have a major impact on past rulings still in force.

Bilateral or *multilateral* **APAs** with **third countries** will be excluded from automatic exchange in case the international tax agreement with these countries does not allow disclosure to third parties (new Art. 8a par. 3). This

could be the case, for instance, under a provision similar to Art. 26 par. 2 of the OECD Model DTC. However, where automatic exchange of information of bilateral or multilateral APAs is excluded under new Art. 8a par. 3 (first sentence), the information identified in par. 6 referred to in the request that lead to issuance of such bilateral or multilateral APA will be exchanged under new Art. 8a par 1 and 2 instead (new Art. 8a par 3, second paragraph). For instance, if a bilateral APA between France and Switzerland has an impact in Germany, the competent authority of France should check whether the DTT with Switzerland allows for disclosure to Germany.

These bilateral or multilateral APAs will then be exchanged under Article 9 DAC (spontaneous exchange), where the international agreement permits that disclosure and the competent authority of the third country gives permission for the information to be disclosed (new Art. 8a par 3).

Art. 8a par 1 and 2 however do not apply in case where an advance cross-border ruling exclusively concerns and involves the tax affairs of one or more **natural persons** (Art. 8a par. 4).

B. Information to be exchanged

Information to be communicated by a Member State includes: a) identification of the taxpayers involved, other than a natural person, and where appropriate the group of persons to which it belongs; b) summary of the content of the ruling, including a description of the relevant business activities or transactions or series of transactions provided in abstract terms, c) date of issuance, amendment or renewal, d) start date of the period of validity, e) end date, f) type of the advance cross-border ruling or APA; g) amount of the transaction; h) description of the criteria used for determination of the transfer pricing or the transfer price in case of an APA; i) identification of the method used for determination of the transfer pricing or the transfer price itself in case of an APA; j) identification of other Member States involved; k) identification of any other person, other than a natural person, in the other Member State, if any, likely to be affected by the ruling; l) the indication whether the information communicated is based upon the advance cross-border ruling or APA itself or upon the request referred to in second subparagraph of par. 3 of this Article (New Art. 8a par. 6 DAC).

It appears that, in this respect, the EU model tends also to adopt a **two-step approach**[75], in the line with the BEPS system. Indeed, according to the first step, the basic information, defined under new Art. 8a par. 6 DAC, should give sufficient information for the receiving State to analyze whether more information is necessary. In a second step, should a Member State wish to investigate further, it may request additional information, following the procedure of art. 5 (exchange upon request) DAC and notably request the full text of the advance cross-border ruling or APA from the Member State having issued the ruling, subject to the condition that the information is foreseeably relevant[76].

The idea is to implement communication on a defined set of basis information that would be accessible to all Member States, based on **practical arrangements** necessary to standardize such communication[77]. To that effect, a **standard form** for the automatic exchange will be adopted by the EU Commission before 1 January 2017 (new Art. 20 par. 5). The development of that standard form will take into account the work performed at the OECD's FHTH, in the context of the BEPS Action Plan[78].

Not only all Member State will receive the information on rulings but also, however to a more limited extend, the **EU Commission**. Indeed, information mentioned under par. 6 a), b), h) and k) of this Article will however not be communicated to the EU Commission (New Art. 8a par. 8 DAC). The limited set of information which should be communicated to the Commission should enable it to monitor and evaluate the effective application of the mandatory automatic exchange and should however « not be used for any other purposes »[79].

Before 1 January 2018, Member State will provide the EU Commission on annual basis with **statistics** on the volume of automatic exchange, under Art. 8 and 8a and, to the extent possible, with information on the administrative and other relevant costs and benefits relating to the exchange that have taken place and any potential changes, for both tax administrations and third parties (new Art. 8 b).

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75 See EU Commission, Explanatory Memorandum to the Proposal for the EU Rulings Directive, COM(2015) 135 final, p. 4.

76 See New DAC, recital (16); EU Commission, Explanatory Memorandum to the Proposal for the EU Rulings Directive, COM(2015) 135 final, p. 4.

77 See New DAC, recital (12) and Art. 8a par. 7.

78 See New DAC, recital (13).

79 See New DAC, recital (14).

Finally, by 31 December 2017, the Commission will develop a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated, in the framework of Art. 8a par. 1 and 2 Ne DAC, will be recorded (New Art. 21 par. 5 DAC). All the Member States will have access to the information recorded in the directory; the Commission will have also access but under the limitation of New Art. 8a par. 8 New DAC (New Art. 21 par. 5 DAC).

C. Confidentiality

As a rule, exchange of information is restricted by a protection of commercial, industrial, or professional secret of the taxpayer[80]. Such clause exists, under art. 17 par. 4 of the DAC. It appears however that, under the 18 March 2015 version of the proposed Directive, the restriction of business secret did not apply to exchange of information of tax rulings (under an proposed new Art. 8 par. 9)[81]. However, in its 2 October 2015 version, this paragraph has been deleted, so that the protection of business secret, under art. 17 par. 4 of the DAC should remain applicable[82]. This modification is welcome. Indeed, as Vanistendael already pointed out, the elimination of commercial and professional secrets would otherwise have the consequence that taxpayers would not seek tax rulings anymore[83].

D. Differences between the EU Model and OECD Action 5 model of exchange of information on rulings

Both models developed by the OECD FHTH and the EU follow the same goal. In addition the EU confirmed that it will « work closely with the OECD, in a coordinated manner »[84]. The aim is to develop a « global level playing field », but the EU intends to take a « leading role by promoting that the scope of information on advance cross-border rulings and advance pricing arrangements to be exchanged automatically should be rather broad ».

80 See for instance Art. 26 par. 3 of OECD Model double taxation treaty and Art. 21 lit. d of the CMAAT; for more details, OBERSON, op. cit. (FN 59), p. 33 ff, 74 ff.
81 See VANISTENDAEL, op.cit. (FN 69), p. 263.
82 See New Art. 8a par. 6 lit. (b) DAC. In this sense, see also, the recital (9) of the EU Rulings Directive.
83 See VANISTENDAEL, op.cit.(FN 69), p. 263.
84 See New DAC, recital (13).

There is however a main difference between the two models. The BEPS project is made of recommendations and as such can be regarded as "soft law". The EU Rulings Directive is part of binding laws which have to be implemented in accordance with the Directives rules and subject to the supervision of the EU Commission and the interpretation of the EUCJ. However, the implementation process of the BEPS program will be subject to a *monitoring* and review by the FHTP[85].

There is also a difference of degree in the implementation of the exchange of information of rulings between the EU and the OECD can be demonstrated in two aspects. First, the EU goes further by promoting not only a spontaneous exchange but an automatic exchange of rulings. Second, the concept of ruling within the EU model seems rather broad and more open to the BEPS concept. Indeed, the EU definition is « sufficiently broad to cover a wide range of situations » and the list examples given is just as a matter of illustration and are is exhaustive[86]. However, this differentiation of scope should not in practice appear to be so different since under the BEPS project, according to the Final 2015 Report, the 6 categories of rulings could be further enhanced by the FHTH, provided they may trigger BEPS concerns.

Finally, the scope of the EU DAC is limited to the EU Member States, while the OECD BEPS is broader. The implications of the EU system could however bring important influences to the world. Not only based on the potential impact of cases of the EUCJ, competent to interpret the DAC, but also because rulings practices could also imply concern of EU State aid rules. Indeed, communication to the EU Commission of the basic information provided for under the New DAC « will not discharge a Member State from its obligations to notify any state aid to the Commission »[87].

The variations between the two regimes, notably automatic versus spontaneous exchange could still lead to important differences of treatments around the world. According to Vanistendael, this could eventually become a problem and rulings form third countries, notably from US companies should also be included; indeed, several companies named in the *lux leaks* affairs are linked to the US[88].

85 See supra III. F.
86 See New DAC, recital (6)
87 See New DAC, recital (14).
88 VANISTENDAEL, op.cit. (FN 69), p. 263.

V. Impact on Switzerland

1. EU Directive on automatic exchange of information on rulings

Switzerland is not a member of the EU so that, as such, the new spontaneous exchange of information regime according to the new version of the DAC is not applicable. Potential bilateral or multilateral advance pricing arrangements of EU countries with Switzerland should, in addition, also be excluded from the scope of automatic exchange in case the treaty with Switzerland does not permit the disclosure to third parties (see new Art. 8a par. 3 DAC). This is often the case under the current Swiss treaty policy. In this situation, this means that only information referred to in new Art. 8a par. 6 will be exchanged.

If the treaty with Switzerland allows for the disclosure of information to third parties of the bilateral or multilateral APA, and the competent authority of Switzerland gives permission, such arrangements will be exchanged according to the spontaneous exchange system provided for in Art. 9 DAC (see new Art. 8a par. 2b DAC).

2. BEPS Action 5 on compulsory spontaneous exchange of information on rulings

Switzerland will however apply the rules of Action 5 of the BEPS program. Spontaneous exchange should take place under the umbrella of the CMMAT, which is currently under ratification in Switzerland. The international legal basis for such exchange would therefore rely on Art. 7 of the CMAAT.

In addition, the Swiss federal law on administrative assistance in tax matters further implements international assistance in tax matters[89]. The Swiss Federal Finance Department (FFD) is also working on a Federal Ordinance to define more precisely the rules of compulsory spontaneous exchange of information of rulings, in accordance with BEPS Action 5. This Ordinance is expected to enter into force on 1 January 2017 or 2018.

[89] Loi fédérale sur l'assistance administrative internationale en matière fiscale, du 28 septembre 2012 (LAAF), RS 672.5.

The system contemplated is that the various cantonal administrations, competent to implement both federal and cantonal direct taw laws in Switzerland, should identify the rulings falling under the scope and then send them to the Federal Tax Administration (FTA). Cross-border spontaneous exchange of such rulings should then take place between the competent foreign tax authorities and the FTA, following the applicable international legal instrument.

Ruling is common practice under Swiss law[90]. The competent authority will therefore have to: (i) define which ruling falls under the scope of compulsory spontaneous exchange, under the guidelines provided for in Action 5; and (ii) determine the countries with which information should be exchange (see in this respect table 5.1 of BEPS Action 5).

It appears that, as far as rulings related to a preferential regime are concerned (category 1.), the following rulings should fall into the scope[91]: cantonal auxiliary company; cantonal « mix » auxiliary company (which is a combination of Swiss and foreign source commercial profits); cantonal holding regimes; « principal structures » (also described as commissionaire's structures); « license box » of canton Nidwalden. We would also add to this list, so-called « finance branch » rulings[92]. Indeed, these rulings provide for a specific attribution of financial profits between the foreign head-office and the Swiss branch.

Some cases are however more delicate to analyze. For instance, *tax exemptions* granted under specific economic zone should in our view not necessarily fall under this scope because these exemptions are part of negotiations with the government which lead to an administrative decision (sometimes even an administrative contract) and not to a ruling.

[90] See among others NIEDERER/DUBACH, op.cit. (FN 10), p. 228 ff.

[91] See also, Swiss Federal Finance Department, « Rapport explicatif sur la consultation relative à la loi sur la réforme de l'imposition des entreprises III », 19 September 2014, p. 10.

[92] For more details, see Swiss Federal Tax Administration, Circular no 8/2002, 18 December 2001, "Répartition internationale des sociétés principales".

VI. Selected Bibliography

BEUSCH MICHAEL, Zulässigkeit und Wirkungen von Verständigungen (Ruling), in: ZSIS 1, 2009, pp. 4 et seq (quoted: BEUSCH, Zulässigkeit und Wirkungen von Verständigungen (Ruling))

BÜRGISSER JÉRÔME, Du ruling fiscal, in: Revue de droit administratif et fiscal (RDAF), 2014, pp. 401-432 (quoted: BÜRGISSER, Du ruling fiscal)

LANG MICHAEL, Tax Rulings and State Aid Law, in: British Tax Review 2015, pp. 391 and seq (quoted: LANG, Tax Rulings and State Aid Law)

NIEDERER CHRISTOPH/DUBACH MARTIN, Private Tax Rulings in Switzerland, in: Bulletin for international taxation 2015, pp. 228-232 (quoted: NIEDERER/DUBACH, Private Tax Rulings in Switzerland)

SCHREIBER RENÉ/JAUN ROGER/KOBIERSKI MARLENE, Steuerruling – Eine systematische Auslegeordnung unter Berücksichtigung der Praxis, in: Archives 80 (2011/12), p. 293 et seq (quoted: SCHREIBER/JAUN/KOBIERSKI, Steuerruling – Eine systematische Auslegeordnung unter Berücksichtigung der Praxis)

OBERSON XAVIER, Droit fiscal suisse, 4th ed., Basel 2012 (quoted: OBERSON, Droit fiscal suisse)

OBERSON XAVIER, International Exchange of Information in Tax Matters. Towards Global transparency, Edward Elgar, Cheltenham UK/Northampton, MA, USA, 2015 (quoted: OBERSON, International Exchange of Information in Tax Matters. Towards Global transparency)

VANISTENDAEL FRANS, Automatic Exchange of Tax Rulings in the EU, in: Tax Notes International, April 20, 2015, pp. 261 et seq (quoted: VANISTENDAEL, Automatic Exchange of Tax Rulings in the EU)