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MOVING TOWARDS MORE TRANSPARENT TAX RULINGS

Analysis of the international legal framework regarding the exchange of information on tax rulings

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Arnau Pujol Perich

Barcelona, 28th of May 2021

ABSTRACT

The use of tax rulings for tax avoidance purposes has become a major global concern as it has become patent that these agreements allow multinational enterprises to artificially reduce their tax burden. As a result, international organizations at all levels have entered a regulatory process that intends to limit such use, mostly by making these tax arrangements more transparent through their exchange between states.

In this context, the present dissertation studies the international legal framework applicable to the EU Member States regarding the exchange of information on tax rulings. This study is mainly developed through the analysis of two of the most important international instruments on the matter, the OECD BEPS Action 5, and the EU Directive 2015/2376. Through this analysis, we can identify the main characteristics of the exchange systems set forth in each of these instruments, the practical difficulties that the coexistence of both exchange systems entails, and also study the impact they have had on the tax ruling practice in EU countries.

Key Words: Tax Ruling, exchange of information, transparency.

Table of Contents

1. INTRODUCTION

Throughout the past few decades corporate taxes have been at the heart of an intense social and political debate. This debate has been mainly the product of an ever-increasing social unrest due to the generally extended feeling that multinational enterprises do not pay a fair amount of taxes[1]. It is commonly accepted that this feeling emerged during the 2008 financial crisis, when it became patent that while most persons suffered the consequences of the crisis and the austerity measures adopted by the governments, many multinational enterprises benefited from lower taxes. As a matter of fact, according to the OECD, from 2007-2011 revenue from corporate taxes went down from 3.59% to 2.81% of the total GDP, while revenue from personal income tax barely changed[2].

This social discontent, however, reached a point of no-return in November 2014, when the media of several countries exposed confidential agreements between Luxembourg's tax authorities and hundreds of multinational companies (usually referred to as the *LuxLeaks scandal*). These agreements, also known as tax rulings, provided companies a statement on the tax consequences of their future transactions in that jurisdiction, on which these enterprises were entitled to rely. Nevertheless, a thorough investigation of these agreements concluded that through them the Luxembourg authorities were systematically allowing multinational enterprises to artificially reduce their tax burden, thus producing a massive tax avoidance that affected countries all over the world.

This scandal, which was nothing but the tip of the iceberg, made blatantly clear to both the public and the political class that a dramatic change in the international tax paradigm was needed to ensure the proper taxation of multinational enterprises. Furthermore, it showed that the lack of cooperation between tax authorities, and more specifically, the lack of transparency of the tax rulings issued by states, played a key role in facilitating the resort to Harmful Tax Practices[3] (HTP).

It is in this context that in the past years the adoption of anti-tax avoidance and evasion measures, the increase of international cooperation in the field of taxation, and the fight against

[1] As a matter of fact, a study made in 2015 by the Pew Research Center showed that almost two-thirds of Americans feel that some corporations do not pay their fair share of taxes. For further details see "Federal Tax System Seen In Need Of Overhaul." (2015).

[2] "OECD Data" (2020).

[3] Harmful tax practices refer to countries issuing highly favorable tax rulings and implementing preferential tax rules/regimes to attract foreign income, thereby eroding the tax bases of other countries.

Harmful Tax Practices have become some of the primary objectives of international organizations at all levels, such as the OECD and the European Union.

To work towards these goals, these organizations have adopted several international instruments on the matter. Among these instruments, it is especially relevant the measures adopted to increase the transparency of tax rulings through their exchange between tax authorities. These measures, recognizing the crucial role that tax rulings play in the set-up of tax avoidance schemes, intended to provide states with more information on the tax rulings issued by other jurisdictions in order to allow them to better react to these agreements and tackle base erosion and profit shifting opportunities of multinational enterprises. To get a glimpse of how important it is to tackle these tax avoidance opportunities, the OECD has estimated that between 83.000 and 200.000 million euros are lost annually due to tax avoidance by multinational companies, which is equivalent to 4-10% of the global corporate income tax revenue[4].

In this dissertation we will attempt to study the regulation set forth in some of these instruments in order to understand the legal framework applicable to the EU Member States regarding the exchange of information on tax rulings, both with each other and with third countries. This analysis ultimately intends to determine to what extent the changes introduced by these instruments have improved the transparency of tax rulings, and also the impact this has had in the tax ruling practice of European countries.

[4] "Base Erosion And Profit Shifting - OECD BEPS" (2021).

2. TAX RULINGS

Before we can start the above-mentioned analysis, we consider it is essential to devote a section of this thesis to study the concept of *tax ruling*.

First of all, it must be noted that, to this day, there isn't a universally accepted definition of this term, mainly due to the disagreement on the exact scope of the concept. Having said this, the OECD defines a tax ruling as "any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely"[5].

From this definition we can observe that the term covers a wide range of tax arrangements between tax authorities and taxpayers.

Following this definition, we can first see that the concept includes both the tax arrangements addressed to a specific taxpayer and those addressed to a group or type of taxpayers (known as "general rulings"[6]). Furthermore, this purposely broad definition makes no mention of how these arrangements have been issued, that is, whether the tax authority has followed a pre-established legal procedure to issue them. As a result, this concept also covers both formal and informal agreements[7]. Finally, the definition demands that the taxpayer is entitled to rely on the arrangement, thus requiring that the tax authority issuing the ruling is bound by it. This last requirement has been subject to a lot of debate, as many consider that non-binding arrangements are also included within this term.

Regardless of the vast range of arrangements included in the meaning of the concept, it is important to highlight that the term tax ruling is usually used to refer to two taxpayer-specific agreements, "advance tax rulings" and "advance pricing arrangements" (APAs).

- An "advance tax ruling" is a statement issued by a tax authority to a specific taxpayer where the authority interprets and/or applies the tax provisions to the specific

[5] OECD (2004), Consolidated Application Note. Guidance In Applying The 1998 Report To Preferential Tax Regimes.

[6] According to the OECD (2004) Consolidated Application Note, "general rulings" are those rulings that "apply to groups or types of taxpayers or activities, rather than to a specific taxpayer. They typically provide guidance on the position of the tax authority concerned on such matters as the interpretation of law and administrative practice", pp. 47.

[7] According to VAN DE VELDE (2015), "Tax Rulings" In The EU Member States, pp.27: "Formal rulings" are those issued following a pre-established set of legal or administrative provisions that describe the process, the competent authority, individuals who can request it, information to be delivered to the authority, duration of the procedure, … *Sense contrario*, "informal rulings" are those issued without following these pre-established provisions.

circumstances of a future transaction. This statement intends to provide legal certainty to the requesting taxpayer on what will be the tax consequences of the referred future transaction. One of the key characteristics of these rulings is that if the taxpayer then carries out the transaction in the terms described in the *ruling*, then he/she is entitled to rely on it.

- An "advance pricing arrangement" is an arrangement regarding the application of Transfer Pricing rules to a specific future transaction. More precisely, it is a binding agreement between one or more tax authorities (depending on which it will be a unilateral, bilateral, or multilateral APA[8]) and a taxpayer, in which they agree on the set of criteria to be used to determine the Transfer Price[9] of a future transaction. This agreement intends to provide the taxpayer legal certainty regarding the determination of the Transfer Prices of a particular future transaction.

On a final note on the concept of tax ruling, it is important to emphasize that there is a consensus that these arrangements are not only legal but also necessary in the modern world we live in. This is mostly because the tax consequences of investment decisions have become increasingly uncertain due to the rising complexity of both, transactions, mainly due to globalization, and also of tax law provisions. Because of this, the use of tax instruments, such as tax rulings, that provide legal certainty and thus encourage investment, is considered to be crucial. However, it is also true that these agreements are not always used to provide such certainty, but rather to attract mobile capital from other jurisdictions in a way that facilitates tax avoidance, especially from multinational enterprises.

It is in this context, as we have previously mentioned, that ensuring the transparency of these arrangements is vital to guarantee that they are used for their original and legitimate purpose and not to facilitate the existence of Harmful Tax Competition between states.

[8] Unilateral Arrangements will involve the agreement between a tax administration and a taxpayer, whereas a bilateral and a multilateral arrangement will involve the agreement of two or more tax authorities and the taxpayer.

[9] The "OECD Glossary Of Statistical Terms - Transfer Price Definition." (2003), defines "transfer price" as the "price, adopted for book- keeping purposes, which is used to value transactions between affiliated enterprises integrated under the same management at artificially high or low levels in order to effect an unspecified income payment or capital transfer between those enterprises".

3. EXCHANGE OF INFORMATION ON TAX RULINGS:

Following the previous section on the meaning of the term tax ruling, we can now proceed to study the legal framework applicable to EU countries regarding the international exchange of these tax arrangements. To do so we shall mostly analyze two international instruments, the OECD BEPS Action 5 and the EU Directive 2015/2376[10]. Such rules, although different in nature and scope, as we will now see, establish a set of measures that regulate the terms on which states are to share information regarding these tax instruments. It is because of this that in this section we will proceed to examine both rules in detail.

OECD BEPS ACTION 5:

This action constitutes one of the four minimum standards included in the OECD Action Plan on Base Erosion and Profit Shifting (BEPS)[11]. This Plan was first introduced in 2013 to address the challenges that globalization poses on international taxation. As the Action Plan recognizes, internationalization has dramatically intensified the practice of Profit Shifting from higher to lower-taxed jurisdictions, creating with this a *race to the bottom* between states to attract multinational enterprises.

Acknowledging the harmful effect this has on affected jurisdictions, this project establishes several actions to be implemented by the OECD Member States and any other state open to collaborate, in order to limit BEPS opportunities and create an international tax framework more suited to the modern world.

To do so, these actions address a variety of very important issues, such as digitalization or Transfer Pricing. Nevertheless, for the scope of this dissertation, we will only focus on Action 5 as it includes a transparency framework based on the exchange of information on tax rulings which, absent exchange, could potentially generate BEPS opportunities[12].

As it has been said before, Action 5 constitutes one of the four minimum standards included in the project, and it is intended to be a continuation of the OECD's work on Harmful Tax Practices. It is worth mentioning that the organization had previously addressed this matter in

[10] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards to mandatory automatic exchange of information in the field of taxation (OJ L 332, 18.12.2015, p. 1–10).
[11] OECD (2013), Action Plan On Base Erosion And Profit Shifting.
[12] "Action 5 - OECD BEPS" (2019).

the OECD's 1998 Report on Harmful Tax Competition[13]. This report represented an important step in the fight against HTP. As a matter of fact, in this document it was agreed, between other things, what factors were to be considered when determining whether a tax regime is preferential and, if so, whether it is harmful or not. Furthermore, this report created the Forum on Harmful Tax Practices (FHTP) which represents an important body in the international fight against HTP[14].

Action 5 essentially intends to revamp the efforts made in this report to stop HTP by adopting measures oriented at increasing transparency. This is due to the underlying conviction that lack of transparency plays a key role in the decision to resort to such practices. This action articulates this increase in transparency through a system of spontaneous and mandatory exchange of information on tax rulings between states (also known as "Transparency Framework").

Nevertheless, transparency in the use of tax rulings cannot be reached only through the exchange of information, but it is also important to improve the transparency of the procedures followed to issue, verify, and publish these rulings. Bearing this in mind, Action 5 also includes a list of "best practices" regarding these procedural aspects[15]. In this dissertation we will not focus on this particular approach to increase the transparency of tax rulings, and thus, we leave that to further studies on this matter. Having said this, we will now proceed to analyze the Transparency Framework set forth in this Action. In order to do that in a comprehensive yet organized matter, we will divide this analysis in the following subsections.

1) Subjective Scope of Action 5

From the very first works on BEPS, the OECD has long recognized that this is a global issue that needs to be tackled through the cooperation of as many countries as possible. It is because of this that project BEPS followed an inclusive approach in the elaboration of the Action Plan, being the latter the product of the collaboration between the OECD members and over 60 other countries[16]. Even after the development of the Plan, the OECD has continued to facilitate and promote the participation of other states willing to implement the BEPS Action Plan. As a result of these efforts to create a global legal

[13] OECD (1998), Harmful Tax Competition: An Emerging Global Issue.
[14] Deloitte (2014), BEPS Action 5: Harmful Tax Practices.
[15] For more information on these "best practices" see the OECD (2015), Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency And Substance, Action 5 - 2015 Final Report.
[16] OECD (2018), Marco Inclusivo De BEPS. Una Respuesta Global A Un Problema Global, pp.1.

framework that goes beyond G20 countries and developing economies, nowadays 139 countries are actively collaborating in the implementation of the BEPS package (Inclusive Framework Members) (See Annex 1).

Consequently, we can observe that the Transparency Framework regulated in Action 5, being part of the BEPS Action Plan, cannot be considered to be applicable only between the OECD Member States but instead has to be understood as a global exchange mechanism applicable to all the jurisdictions that have implemented it.

2) Objective Scope of the exchange of information

As the Action's provisions specify, the compulsory spontaneous exchange of information system set forth doesn't apply to all kinds of tax rulings. As we saw, the concept of *ruling* is very broad and thus, it is necessary to determine which tax rulings shall be subject to exchange with other countries. As a matter of fact, the Action includes a list of six categories of rulings which, in the absence of exchange, could potentially give rise to BEPS opportunities. The choice of specifically stating the rulings that are to be exchanged intends to decrease the discretionary power in the hands of states when deciding which rulings should be exchanged and which shouldn't[17]. The list includes the following taxpayer-specific rulings:

- Rulings relating to preferential regimes: This includes all rulings related to any preferential regime. This obligation is independent of whether the preferential regime has been deemed harmful or not. It is worth noting that in case there is a ruling related to a specific regime that has not yet been analyzed by the FHTP to determine if it constitutes a preferential regime, the state in question will have to assess whether that specific regime fulfills the criteria to be considered preferential[18], and in case there is any doubt, it is recommended that the state exchanges the information about the ruling in question[19].

[17] OBERSON (2016), International Exchange Of Information On Rulings, pp. 516.
[18] See the criteria used to identify preferential tax regimes according to the OECD (1998), Harmful Tax Competition: An Emerging Global Issue, p. 25-33.
[19] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, pp.108.

- Unilateral Advance Pricing Agreements (APAs) or other cross-border unilateral rulings in respect to transfer pricing: It is relevant to emphasize that this excludes both bilateral and multilateral APAs.
- Cross-border rulings providing downward adjustments of taxable profits.
- Permanent establishment rulings.
- Related party conduit rulings.
- Any other type of ruling agreed by the FHTP that in the absence of spontaneous information exchange gives rise to BEPS: As we can see, the list of rulings subject to exchange is not a strict *numerus clausus*, as the FHTP is given the power to include other rulings in the list if it considers it necessary to prevent BEPS opportunities. This, in a way, constitutes an acknowledgment that international tax practices continue to evolve and thus this instrument must necessarily have a dynamic nature.

As we can see, this list of categories subject to the Transparency Framework leaves little room for states' discretionary decisions on what rulings to exchange. Nevertheless, many authors have criticized the fact that in case there is any doubt about a tax ruling related to a preferential regime, states should exchange it anyway[20]. It is their opinion, and ours as well, that this leaves far too much discretionary power to states to decide whether it is doubtful the regime in question is preferential or not.
As a finishing note on the objective scope of this exchange framework, we can see that general rulings are excluded from the compulsory exchange of information.

3) Time Limits

In order to properly identify the scope of this Framework, it is necessary to address the time-related limitations set forth in this Action. As we have seen, only the rulings comprised within the six categories previously mentioned are subject to the Transparency Framework. Nevertheless, to limit the administrative burden on states,

[20] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, pp. 109.

only those rulings issued in a certain time frame will in fact be subject to the above-mentioned exchange.

The regulation of this time frame is complex and case-specific, but for the OECD Member States, the general rule is that rulings issued before January 1st*, 2010* fall out of the scope of the Framework. On top of that, not all rulings issued after this date are automatically subject to exchange, but only those that fall within the definitions of *future* or *past rulings. Past rulings* include those issued after January 1st, 2010, provided they are still in force on January 1st, 2014, and also all those issued after the latter date, until March 31st, 2016. All rulings issued after this date are to be considered *future rulings.*

The distinction between these two types of rulings is not at all irrelevant. Although they both are subject to the Transparency Framework, the period within which they have to be exchanged is very different.

On one hand, all *past rulings* must be spontaneously exchanged before the end of 2016. On the other hand, *future rulings* must be exchanged as soon as possible and always within three months, counting from the moment the ruling is made available to the competent authority of the issuing state. However, the regulation provides that these three months can be extended in case there is a delay due to legal impediments. Once these impediments cease to exist the country will have to exchange the information without "undue delays" [21]. This last term ("undue delays") has been widely criticized, especially by CHUKWUDUMOGU, for being too subjective, thus leaving room for potential abuse by States[22].

4) Binding nature and Peer Review

The BEPS Action Plan is not a legally binding instrument (*soft-law*) and thus needs to be implemented by the adhering countries in their domestic legal systems. Despite not being directly enforceable, its consensual nature accords it great force as representing the political will of the states participating in the Inclusive Framework on BEPS[23].

[21] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, pp. 114.
[22] CHUKWUDUMOGU (2015), Countering Harmful Tax Practices: The Feasibility Of Compulsory And Spontaneous Exchange Of Information On Tax Rulings, pp. 28.
[23] European Parliament (2019), Understanding BEPS. From Tax Avoidance To Digital Tax Challenges, pp.4.

In the specific case of the Transparency Framework, in order to promote and ensure its implementation, Action 5 establishes a *peer-review* system oriented at regularly examining the level of compliance of the participating states with the minimum standard defined in the Transparency Framework.

This *peer review* must be conducted according to the Terms of Reference and Methodology for peer review[24].

On one hand, this document establishes the four key elements of the Transparency Framework (*terms of reference*) the implementation of which is subject to evaluation through the peer-review process. These elements are the information gathering process; exchange of information; confidentiality of information received and statistics.

On the other hand, the document sets forth a procedural mechanism by which the FHTP, with the active participation of the adhered jurisdictions, will complete the peer-review process. Through this monitoring process, the FHTP publishes an annual peer-review report assessing the degree of implementation of Action 5 minimum standard by members of the Inclusive Framework on BEPS[25] .

As we can see, although Action 5 does not introduce directly enforceable binding provisions, its consensual nature and the introduction of the peer review system promote its implementation by the participating jurisdictions.

5) Exchange mechanisms

The compulsory spontaneous exchange of tax rulings between states regulated in Action 5, as any other type of international administrative cooperation, cannot be conducted absent the use of an international legal instrument that enables such exchanges. That is, when implementing the Transparency Framework, states have to sign an International Treaty with the other participant jurisdictions (whether that is through bilateral agreements or multilateral ones), to provide the necessary legal basis for the exchange of such information between those specific countries.

[24] OECD (2021), BEPS Action 5 On Harmful Tax Practices – Transparency Framework: Peer Review Documents.
[25] See subsection 8 regarding the "Implementation process".

It is in this context that it is especially surprising that the Framework barely mentions which international instruments could participating states use to articulate the above-mentioned exchange[26].

This topic has been thoroughly studied by many scholars, such as Moreno. In her opinion, two international legal instruments could be especially useful to articulate the Transparency Framework[27]. These two instruments are the following:

1. **Double Taxation Agreement (DTA) with a specific clause to allow the exchange of information.**

   This is a bilateral instrument, so in order to allow the spontaneous exchange of information, the implementing country would have to conclude such an agreement with each jurisdiction participating in the Transparency Framework, individually. This process obviously poses a huge administrative burden in the implementation of the Framework.

2. **Convention on Mutual Administrative Assistance in Tax Matters**[28]

   Article 7 of this Convention expressly refers to a spontaneous exchange of information in five different situations[29]. The biggest problem regarding this instrument is that these five scenarios where the spontaneous exchange is allowed, do not fully match the objective scope of Action 5's Transparency Framework. Because of this, in order to

[26] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, pp. 102.
[27] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, p. 102-106.
[28] OECD and Council of Europe (2011), The Multilateral Convention On Mutual Administrative Assistance In Tax Matter: Amended By The 2010 Protocol.
The original Convention was developed by the OECD and the Council of Europe back in 1988. This original text, however, was amended in 2010 to adapt the Convention to the new standards on administrative assistance in the field of taxation, especially regarding the exchange of information. The amended version of the Convention entered into force on June 1st, 2011.
[29] According to Article 7: "A Party shall, without prior request, forward to another Party information of which it has knowledge in the following circumstances: "a. the first-mentioned Party has grounds for supposing that there may be a loss of tax in the other Party; b. a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned Party which would give rise to an increase in tax or to liability to tax in the other Party; c. business dealings between a person liable to tax in a Party and a person liable to tax in another Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other Party or in both; a Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises; e. information forwarded to the first-mentioned Party by the other Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Party."

provide the legal basis to the exchange of all the tax rulings subject to the aforementioned Transparency Framework, it would be necessary to expand the scope of Article 7[30].

Besides this issue, its multilateral nature (has been agreed by 141 jurisdictions worldwide[31]) makes it a more adequate instrument as it provides all signatory countries the necessary legal basis for the exchange of tax rulings with any state participating in the Convention, and not just with an individual state as is the case with DTA.

On a final note on this topic, it is worth noting that there are still some participating jurisdictions that have not yet concluded any of these international agreements with all the other Inclusive Framework members[32]. This implies that there are still some states that lack the legal basis to exchange tax rulings with some participating members of the Transparency Framework.

6) Jurisdictions receiving the information

Until now, we have seen, between other things, what tax rulings are to be spontaneously exchanged by countries that have implemented the Transparency Framework, yet we still don't know with whom. Action 5 adopted a conservative approach regarding who the receiving jurisdictions had to be. In this regard, this action provides that each tax ruling subject to the Framework only has to be exchanged with those jurisdictions that can be affected by that specific tax ruling. This approach intends to preserve the balance between the necessary transparency of the rulings while preserving a reasonable sphere of privacy and limiting the administrative burden on states.

Action 5 Final Report states that[33]:

"As a general rule, exchange of information on rulings for the six categories need to take place with:

[30] KLÄSER (2017), The Swiss Tax Ruling Practice: Recent Domestic And International Developments.
[31] See OECD (2021), Jurisdictions Participating In The Convention On Mutual Administrative Assistance In Tax Matters.
[32] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, pp. 106.
[33] OECD (2015), Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency And Substance, Action 5 - 2015 Final Report, pp. 54.

a) *The countries of residence of all related parties[34] with which the taxpayer enters into a transaction for which a ruling is granted or which gives rise to income from related parties benefiting from a preferential treatment; and*

b) *The residence country of the ultimate parent company and the immediate parent company."*

This rule is applied for most types of tax rulings, nevertheless, the report establishes a set of specificities for certain rulings, such as PE or conduit rulings. Below we can observe a summary table of these specificities.

Table 1: Identification of the receiving jurisdictions

What rulings are covered?	With which country does information need to be exchanged?
1. Rulings related to a preferential regime **Shipping company regimes, banking regimes, insurance regimes, financing and leasing regimes, fund management regimes, headquarters regimes, distribution centre regimes, service centre regimes, IP regimes, holding company regimes, and other miscellaneous regimes identified as preferential regimes by the FHTP**	i. The countries of residence of all related parties (a 25% threshold would apply), with which the taxpayer enters into a transaction for which a preferential treatment is granted or which gives rise to income from related parties benefiting from a preferential treatment (this rule also applies in a PE context); and ii. The residence country of (a) the ultimate parent company and (b) the immediate parent company.
2. Cross-border unilateral APAs and any other cross-border unilateral tax ruling (such as an ATR) covering transfer pricing or the application of transfer pricing principles	i. The countries of residence of all related parties with whom the taxpayer enters into transactions that are covered by the APA or cross-border unilateral tax ruling; and ii. The residence country of (a) the ultimate parent company and (b) the immediate parent company.
3. Cross-border rulings giving a unilateral downward adjustment to the taxpayer's taxable profits in the country giving the ruling	i. The countries of residence of all related parties with whom the taxpayer enters into transactions covered by the ruling. ii. The residence country of (a) the ultimate parent company and (b) the immediate parent company
4. PE rulings	i. The residence country of the head office, or the country of the PE, as the case may be; and ii. The residence country of (a) the ultimate parent company and (b) the immediate parent company.
5. Related party conduit rulings	i. The country of residence of any related party making payments to the conduit (directly or indirectly); ii. The country of residence of the ultimate beneficial owner (which in most cases will be the ultimate parent company) of payments made to the conduit; and iii. To the extent not already covered by ii), the residence country of (a) the ultimate parent company and (b) the immediate parent company.

Source: OECD (2015) Action 5 Final Report.

[34] According to the same report, "two parties would be considered related if the person has 25% or greater investment in the second person or there is a third person that holds a 25% or greater investment in both".

7) Exchange procedure

To limit the administrative burden on states, Action 5 divides the exchange procedure into two different phases.

In the first one, the issuing state exchanges with the above-mentioned affected countries a simple form that includes very basic information about the specific tax ruling. This form includes information such as issuing date, type of ruling, identification of the taxpayer, accounting periods covered by the ruling, … [35].

In the second phase, the receiving countries decide whether to request further information about the ruling, or even the ruling itself.

This two-phase system is intended to establish a filter in the exchange process, in order to prevent issuing states from having to exchange very detailed information on every single tax ruling (with the administrative burden this implies).

By sending first a simple form with basic data, the receiving jurisdictions can adequately assess whether there is a need for additional information, instead of simply requesting that additional information for all the tax rulings that affect them.

When discussing the exchange procedure, it is worth mentioning that the issuing state has the right to demand the confidentiality of the information it exchanges. Because of this, receiving countries will have to establish appropriate measures to ensure such confidentiality. These measures can be found both in the international treaties that enable the exchange of tax rulings[36] and also in domestic law.

In case the issuing state considers these measures to be insufficient, it can limit or even suspend the exchange of information with that specific country[37].

8) Implementation Process

As it has been said earlier on, the peer review process is a key element to ensure the proper implementation of the Transparency Framework by the Inclusive Framework Members. So far, this process has led to the publication of four annual peer review

[35] OECD (2015), Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency And Substance, Action 5 - 2015 Final Report, Annex C.
[36] See subsection 5 regarding "Exchange mechanisms".
[37] OECD (2015), Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency And Substance, Action 5 - 2015 Final Report, p. 57-58.

reports by the FHTP. In this subsection, we will proceed to briefly analyze them in order to evaluate to what degree countries have implemented the Transparency Framework.

2016 Peer Review Report on the Exchange of Information on Tax Rulings[38] : This was the first peer review report and only covered the assessment of 44 jurisdictions (essentially OECD members and other countries that were in the OECD accession process during the BEPS project). This report included recommendations for improvements on the implementation of the Transparency Framework to most countries examined (a total of 49 country-specific recommendations). As a matter of fact, only 16 of those 44 jurisdictions had no recommendations for improvements. This highlights that most jurisdictions had not fully implemented the Transparency Framework yet.

2017 Peer Review Report on the Exchange of Information on Tax Rulings[39]: This report covered the assessment of 92 jurisdictions, which represents a considerable increase in the scope of the review. Through this report, we can observe that many states dully implemented the recommendations made in the 2016 Report. One clear example is the case of Luxembourg, which implemented all three of its recommendations.

As a result of this, 55 jurisdictions were considered to have correctly implemented the Transparency Framework, and thus were not given any recommendations for improvements. This clearly shows a very positive trend of the Inclusive Framework Members towards the appropriate implementation of the minimum standard and the recommendations made to them through these reports.

2018 Peer Review Report on the Exchange of Information on Tax Rulings[40]**:** In this third annual report, 112 jurisdictions were assessed. Through this report, we can observe a clear continuation of the above-mentioned trend of implementing the

[38] OECD (2017), Harmful Tax Practices – 2016 Peer Review Reports On The Exchange Of Information On Tax Rulings: Inclusive Framework On BEPS: Action 5.
[39] OECD (2018), Harmful Tax Practices – 2017 Peer Review Reports On The Exchange Of Information On Tax Rulings: Inclusive Framework On BEPS: Action 5.
[40] OECD (2019), Harmful Tax Practices – 2018 Peer Review Reports On The Exchange Of Information On Tax Rulings: Inclusive Framework On BEPS: Action 5.

recommendations made to each country. As a matter of fact, 77 of these jurisdictions were not given any recommendations for improvements.

2019 Peer Review Report on the Exchange of Information on Tax Rulings[41]: This is the last report published and covers the assessment of 124 jurisdictions of the 139 Inclusive Framework Members. Again, we can see that the scope of the report continues to increase, thus providing much more valuable information. This report contains recommendations for 43 jurisdictions (thus 81 countries were considered to have adequately implemented the Framework).
These numbers indicate that, although states continue to improve their implementation of the Framework, some of the recommendations have become "permanent". That is, some countries continuously fail to fully implement the Transparency Framework into their legal systems. One of the clearest examples of this problem is the case of Spain, which is continuously failing to implement its recommendations. As a matter of fact, the only recommendation Spain has had since the 2017 Report is to "identify and exchange relevant information on new assets of existing taxpayers benefitting from the grandfathered IP regime". However, the country has continuously failed to do so.

As a result of this analysis, we can see that although Action 5 is not legally binding, it has been broadly implemented by the Inclusive Framework Members. This implementation has been gradual and although it is not yet complete, we can observe there is a general trend towards that goal. Nevertheless, we are starting to observe that some countries are continuously failing to implement the recommendations made in the Peer Review Reports, which constitutes a setback in the global implementation of the Transparency Framework.

Critical Assessment of Action 5:

BEPS Action 5's Transparency Framework has been subject to both praise and fierce criticism by scholars. While there is a consensus that this instrument constitutes an important step in the right direction to tackle HTP, many consider it to be a "missed opportunity" as it lacks, in their

[41] OECD (2020), Harmful Tax Practices – 2019 Peer Review Reports On The Exchange Of Information On Tax Rulings: Inclusive Framework On BEPS: Action 5.

opinion, the necessary ambition and completeness to transform the current international tax *status quo.*

It is in this regard that we must humbly express our disagreement with this criticism. It is true that the content of the compulsory spontaneous exchange of information system set forth in Action 5 leaves some important loopholes (previously mentioned). Certainly, it could also impose more ambitious obligations to the participating states to enhance transparency and deter the use of HTP, such as the abuse of tax rulings. Nevertheless, as we mentioned, Action 5 is based on the idea that BEPS is a global issue that can only be tackled through the cooperation of as many countries as possible. Only by creating a truly Global Transparency Framework, there can be a real change in the current paradigm of harmful tax competition. In light of this, the decision to adopt a relatively conservative approach to promote and facilitate the implementation of the Framework by third countries cannot be considered a "missed opportunity", but rather a manifestation of the conviction that it is better to have a less ambitious Framework that many countries can agree on than a very strict one that only a few states implement. This approach has resulted, as we have seen, in the implementation of the Framework by 139 countries worldwide (well beyond the OECD Member States).

It is because of this that we do not consider the BEPS Action 5 to be a "missed opportunity" but instead a milestone towards a truly Global cooperative strategy towards stopping HTP.

EU DIRECTIVE 2015/2376:

Until now we have analyzed the Transparency Framework set forth in Action 5, which regulates the terms on which the Inclusive Framework Members are to share information regarding tax rulings with each other. Nevertheless, this analysis is insufficient to get a full picture of the legal framework applicable to EU countries on this matter. This is due to the fact that the European Union has also adopted several bodies of law regulating the specific terms on which these tax instruments have to be exchanged between the EU Member States, such as the Council Directive 2015/2376. As we can see, the EU Member States are subject to a dual international regulation, one regarding the exchange of information of tax rulings with third countries that have implemented the Transparency Framework, and another for the exchange of these tax instruments with the other EU Member States.

In this context, it is worth mentioning that the implementation of EU legislation on Harmful Tax Competition must not be seen as a reaction to the OECD BEPS Action Plan, but instead as part of a European regulatory process aiming at ensuring the well-functioning of the internal market by preventing HTC from taking place within its borders. As a matter of fact, the EU works on the harmful effects of tax competition date back to December 1997 (in parallel with the OECD 1998 Report on Harmful Tax Competition[42]), when the Council of the EU together with the representatives of the national governments adopted a Code of Conduct for business taxation, aiming at curbing harmful tax competition[43]. Through this instrument, although not legally binding, the EU Member States committed to[44]:

- *"re-examine, amend or abolish their existing tax measures that constitute harmful tax competition (rollback process)*
- *refrain from introducing new ones in the future (standstill process)"*

Furthermore, in order to identify the tax measures that could constitute HTC, on March 9th, 1998, the Economic and Financial Affairs Council (ECOFIN) created the Code of Conduct Group, which, just like the FHTP, adopted a key role in the international fight against HTP. Since its creation, the Group has presented multiple reports with the evaluation of over 400 tax regimes. For the scope of this dissertation, it is especially relevant the content of the Final Report on harmful tax regimes that the Group submitted to the ECOFIN Council in November 1999[45]. In this report, the Group analyzed 271 measures of the EU Member States and concluded that 66 of them were harmful. In addition, the report states that 15 of these harmful measures relied on tax rulings[46].

It is worth noting that in 1999, in parallel with the work of the Group, the EU Commission requested a report on the Administrative Tax Practices that were likely to influence the location of businesses within the EU[47]. This report, commonly known as Simmons & Simmons Report, identified, among other things, a correlation between lack of transparency and the existence of

[42] OECD (1998), Harmful Tax Competition: An Emerging Global Issue.
[43] See the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of December 1st, 1997, on a Code of Conduct for business taxation (*Official Journal C 002 , 06/01/1998 P. 0001 – 0006).*
[44]"Code Of Conduct Group (Business Taxation)" (2021).
[45] Code of Conduct Group (1999), Code Of Conduct (Business Taxation).
[46] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, pp. 87.
[47] SIMMONS and SIMMONS (1999), Administrative Practices In Taxation.

administrative practices likely to affect the location of business activities in the EU (such as *tax ruling* practices)[48].

Following the creation of the Group, the work on HTC at the EU level continued (parallel to the OECD works), but the most relevant transformation on this field came with the adoption of the EU Council Directive 2011/16/EU, on administrative cooperation in the field of taxation[49]. This Directive manifested the need for a new framework to articulate the mutual assistance between the Member States in tax matters, and in consequence, repealed the then in force Council Directive 77/799/EEC of 19 December 1977[50], as it considered it to be insufficient to face the challenges that globalization poses in the field of taxation.

Regarding the exchange of tax rulings, this Directive enabled the exchange of information on *advance cross-border rulings* and *APAs* between the Member States both spontaneously and upon request. Nevertheless, this exchange mechanism was hampered by multiple practical difficulties, such as the discretionary powers the Member States were given to decide who to share the information with[51].

Because of these difficulties and due to the ever-evolving nature of international tax law, this Directive has been subject to several Amendments over the years (see Annex 2).

In this section, we will proceed to analyze in detail the regulation introduced by one of these Amendments, the EU Council Directive 2015/2376 of 8 December 2015. This Directive was the main element of a Tax Transparency Package presented by the EU Commission in 2015. It establishes an automatic exchange of information system between Member States to overcome the problems that the spontaneous exchange presented and enhance transparency. In order to examine the details of this regulation we will divide the analysis into several subsections, just as we did with Action 5.

1) Subjective Scope and Binding Nature

This automatic exchange of information system was introduced through a Directive. As it is well-known, this is a binding legislative act that sets a goal that all EU Member

[48] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, pp. 86.
[49] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011, p. 1–12).
[50] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ L 336, 27.12.1977, p. 15–20)
[51] Whereas nº 4 of the EU Council Directive 2015/2376.

States must achieve but leaves the national authorities the decision on the means to reach those goals.

As a result, this system is only applicable to the EU Member States, which must transpose this Directive into their national laws as they deem more adequate to achieve the goals set.

2) Objective Scope

As the Directive itself specifies, only "advance cross-border rulings" and "advance pricing arrangements" will be subject to automatic exchange[52]. That is, only these two types of agreements will have to be systematically communicated to the other Member States, without prior request.

However, it is necessary to note that both terms are very broad. This is precisely why the Directive includes a thorough description of both concepts in the following terms:

On one hand, an "advance cross-border ruling" is "any agreement, 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:"[53]

a) Issued, amended or renewed by, or on behalf of, the government or the tax authority of a Member State, irrespective of whether it is effectively used or not;
b) Addressed at a particular person or group of persons, upon which they are entitled to rely;

   This specific condition has been subject to a lot of academic debate, as the provision seems to require that the agreement is necessarily binding to the issuing tax authority. However, the "Whereas nº 5" of this Directive[54] expressly states that it is irrelevant whether the agreement is binding or not and also its formal or informal nature. The choice to disregard these elements intends to reduce possible loopholes and ensure the effectiveness of the exchange mechanism.

[52] As we can see from the definition of the term "automatic exchange" in article 3.9 of the Amended EU Directive 2011/16, this concept implies a systematic communication of information without prior request, at pre-established regular intervals.
[53] Article 3.14 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376.
[54] See Whereas nº 5 of Directive 2015/2376.

On a final note on this particular condition, some authors have interpreted that the inclusion of informal agreements within the scope of the Directive implies the inclusion of oral agreements as well[55].

c) Concerns the interpretation or application of a legal or administrative tax provision;
d) Relates to a cross-border transaction;

   For the purpose of this Directive, a "cross-border transaction" is a transaction where[56]:

   - Not all the parties are residents in the issuing Member State;
   - Any party to the transaction is simultaneously resident in more than one jurisdiction;
   - One of the parties conducts business in another jurisdiction through a permanent establishment and the transaction forms part or whole of the business of the permanent establishment; or
   - The transaction has a cross-border impact.

e) It is made in advance of the transaction in question, or the activities carried out in another jurisdiction, or before the filing of a tax return for that period.

On the other hand, an "advance pricing arrangement" is "any agreement, 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:"[57]

a) Issued, amended, or renewed by, or on behalf of, the government or the tax authority of one or more Member States, irrespective of whether it is effectively used or not;
b) Addressed at a particular person or group of persons, upon which they are entitled to rely; and
c) Determines in advance of cross-border transactions between associated enterprises[58], an appropriate set of criteria for the determination of the Transfer

[55] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, p. 50-51.
[56] Article 3.16 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376.
[57] Article 3.15 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376.
[58] Article 3.15 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376, states that: "Enterprises are associated enterprises where one enterprise participates directly or indirectly in the management, control or capital of another enterprise or the same persons participate directly or indirectly in the management, control or capital of the enterprises".

Pricing[59] for those transactions or the attribution of profits to a permanent establishment.

For the purpose of APAs, a "cross border transaction" is a transaction that[60]:

- Involves associated enterprises that are not all residents of a single jurisdiction; or
- The transaction has a cross-border impact.

As we can observe, the broad nature of both definitions implies that a wide range of agreements fall within the objective scope of the Directive, and thus must be automatically exchanged. Nevertheless, it is necessary to briefly comment on two noteworthy exclusions that can undoubtedly affect the effectiveness of the Directive.

First of all, both concepts cover the agreements issued to legal persons, but the Directive explicitly excludes the exchange of those "advance cross-border rulings" issued solely to natural persons[61]. This exclusion intends to limit the administrative burden imposed on States and also protect the fundamental right to data protection of the affected individuals. However, many tax experts argue that it disproportionally restricts the scope of the exchange mechanism.

It is interesting to highlight that the rule does not make any mention to whether the so-called *mixed rulings*, that is, those rulings issued both to legal and natural persons, have to be exchanged. Authors such as VANISTENDAEL believe that a broad interpretation of the text would imply the inclusion of these rulings within the scope of the Directive[62].

Second of all, both concepts refer to agreements on "cross-border transactions", as defined by the Directive itself (in the terms previously mentioned). This requirement seems to exclude from the objective scope of the automatic exchange the "*domestic rulings*", that is, those rulings with no cross-border dimension. This topic was thoroughly analyzed in the Staff Working Document accompanying the proposal of

[59] Article 3.15 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376, defines "transfer prices" as: "Prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises, and "transfer pricing" is to be construed accordingly".
[60] Article 3.16 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376.
[61] See Article 8a.4 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376.
[62] VANISTENDAEL (2015), "Automatic Exchange Of Tax Rulings In The EU.", pp. 262.

Directive[63] , back in 2015, and it was determined that these rulings did not necessarily concern the functioning of the internal market, and thus there was no legal basis to include them in the automatic exchange mechanism. However, many scholars disagree with that statement as they consider that "*domestic rulings*" can potentially make an impact internationally.

3) Time Limits

In order to accurately identify the objective scope of the Directive, it is necessary to address the time-related limitations set forth in the rule itself. As we have seen, both "advance cross-border rulings" and "advance pricing arrangements" will be subject to automatic exchange. However, to limit the administrative burden on states, only those rulings issued in a certain time frame will in fact be subject to the above-mentioned exchange.

First of all, the Directive provides that all those rulings issued, amended, or renewed after December 31st, 2016 must be automatically exchanged (we will see what information shall be communicated) with the competent authorities of all other Member States and the EU Commission (subject to restrictions) within the three months following the end of the semester during which the "advance cross-border ruling" or "advance pricing arrangement" in question has been issued, amended or renewed[64].

Secondly, the rule provides a specific regulation for those rulings issued, amended, or renewed before that date, known as the *retroactive clause*. This retroactive clause intends to establish the extent of the retroactive effects of the Directive. To do so, the rule distinguishes between rulings issued, amended, or renewed before 2012 and after that date (and prior to 2017). In the first case, the general rule is that those rulings fall out of the scope of the Directive and therefore will not be subject to exchange. In the second case, the rule establishes, on one hand, that those rulings issued, amended, or renewed between January 1st, 2012 and December 31st, 2013 will only be exchanged

[63] European Commission (2015), Commission Staff Working Document Accompanying The Proposal For A Council Directive Amending Directive 2011/16/EU.
[64] Article 8a.1 and 8a.5 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376.

provided they are still valid on January 1st, 2014. On the other hand, if they have been issued, amended, or renewed between January 1st, 2014 and December 31st, 2016 the exchange will take place regardless of whether they are still valid or not. When a ruling must be exchanged because of this retroactive clause, that communication will have to take place prior January 1st, 2018.

Regardless of this, the Directive provides a very important exclusion from the effects of the retroactive clause. This exclusion states that the Member States may omit from the referred communication the information on "advance cross-border rulings" and "advance pricing arrangements" issued, amended, or renewed before April 1st, 2016 to a particular person or group of persons that are not conducting financial or investment activities, provided the group-wide annual net turnover for the fiscal year preceding the issuing, amendment, or renewal date is below 40 million euros[65].

On a personal note on these time limitations, it is nothing short of surprising the very limited retroactive effect given to the Directive, as the retroactive clause only goes back five years from the date the rule entered into force. This decision entails an important and somewhat disproportionate restriction to the effectiveness of this rule on past tax rulings, especially considering that it is solely justified on reducing the administrative burden on States. Furthermore, this approach contrasts with the clear intention of the Directive to include as many agreements as possible within its scope, which can be easily seen, for example, by the explicit disregard of whether the agreements are binding or not and also of their formal or informal nature.

4) Exchange procedure

Just as we saw with Action 5, the Directive provides for an exchange mechanism divided into two different phases.
In the first one, the issuing, amending, or renewing State must exchange with all the other Member States and also the European Commission (subject to restrictions) a normalized form that includes basic information about the specific "advance cross-

[65] For further specificities regarding this exclusion from communication, see Article 8a.2 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376.

border ruling" or "advance pricing arrangement". This form includes the following information[66]: identification of the person or group of persons receiving it; summary of the content of the agreement; issuing, amending or renewing date; start and end date of the period of validity; type of "advance cross-border ruling" or "advance pricing arrangement"; amount of the transaction; criteria used to determine the transfer price; a list of the Member States likely to be concerned by the agreement and finally the identification of any person of other Member States, other than natural persons, that could potentially be affected by it.

It is interesting to highlight that the Directive provides that the information regarding the identification of the person or group of persons receiving it; the summary of the content; the criteria used to determine the transfer pricing and the identification of persons likely to be affected by it, shall not be shared with the European Commission. This exclusion intends to ensure that the Commission only has access to the necessary information to examine the compliance with the Directive by the Member States, while not providing them additional information that could potentially be used for other purposes, such as State Aid investigations. However, this provision is theoretically unnecessary as the same Directive specifically forbids the use by the Commission of the information received for any other purpose other than the review of whether the Member States comply with the rule[67].

As it was mentioned in the previous subsection, as a general rule, this exchange will have to take place within the three months following the end of the semester during which the ruling has been issued, amended, or renewed. However, for all those agreements affected by the retroactive clause, this exchange will have to take place before January 1st, 2018.

In the second phase, the receiving Member States decide whether to request further information about the "advance cross-border ruling" or "advance pricing arrangement" in question, or even the ruling itself. This request will be articulated through the

[66] See article 8a.6 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376, regarding the information to be communicated by Member States.
[67] Article 23a.1 of the Amended EU Directive 2011/16, added by the EU Directive 2015/2376.

regulation set forth in article 5 of the Directive 2011/16, regarding exchange upon request.

This two-phase system is intended to establish a filter in the exchange process, in order to prevent the issuing, amending, or renewing States from having to exchange very detailed data on every single tax ruling (with the administrative burden this implies).

By sending first a simple normalized form, the receiving Member States can adequately assess whether there is a need for additional information, instead of simply requesting that additional information for all the tax rulings.

Lastly, as a final comment on the exchange procedure regulated in this rule, we consider it is essential to emphasize that the information shall be exchanged with all Member States. This provision eliminates the traditional discretionary powers of States when deciding who could be affected by the agreement and thus should receive the information in question, and as a result improves the effectiveness of the exchange mechanism and enhances transparency.

5) Transposition of the Directive by the Member States

Finally, as it was mentioned in subsection 1), for this legal framework to be effective, the regulation set forth in this Directive must be transposed into the national laws of each Member States.

This transposition process, according to the rule, had to take place before December 31st, 2016, nevertheless, some Member States transposed it after this deadline. One of these States was Spain, which adopted the automatic exchange framework set forth in the Directive through the Royal Decree 1070/2017 of December 29th, which modified the Royal Decree 1065/2007 of July 27th and the Royal Decree 1676/2009 of November 13th [68].

[68] Real Decreto 1070/2017, de 29 de diciembre, por el que se modifican el Reglamento General de las actuaciones y los procedimientos de gestión e inspección tributaria y de desarrollo de las normas comunes de los procedimientos de aplicación de los tributos, aprobado por el Real Decreto 1065/2007, de 27 de julio, y el Real Decreto 1676/2009, de 13 de noviembre, por el que se regula el Consejo para la Defensa del Contribuyente.

Regardless of these temporary delays in the transposition of the rule, nowadays all Member States have adopted one/several legal and administrative provisions that implement the automatic exchange system in their domestic law[69].

Critical Assessment of the EU Directive 2015/2376:

The EU Directive 2015/2376 on the mandatory automatic exchange of information in the field of taxation constitutes one of the most noteworthy international instruments adopted in the fight against Harmful Tax Practices. This Directive has been globally hailed as a turning point in the search for greater transparency of tax rulings, which is understood to be a key element to ensure an international Fair Tax Competition between States. This has been mainly due to the ambitious nature of the rule, which can be observed with decisions such as the automatic character of the exchange, the extensive objective scope of the mechanism, or the fact that all Member States receive the information and not only those considered to be directly affected by the agreement. However, it is important to highlight that the Directive still leaves some important loopholes that undermine the realization of its goals. Some of the most relevant ones are the limited retroactive effect of the Directive, the exclusion from the objective scope of the rule the "domestic rulings" and the "advance cross-border rulings" addressed exclusively to natural persons, and finally, the practical difficulties of effectively exchanging information on "informal rulings" such as the oral ones.

Regardless of these loopholes, the automatic exchange mechanism set forth in this rule has arguably positioned the EU as a global leader in the transformation of international tax law. Nevertheless, it is important to understand that Harmful Tax Competition is not a European problem but rather a global challenge that must be tackled accordingly. The Directive, although ambitious, is only applicable between the EU Member States and thus it is insufficient to truly transform the international tax *status quo.* To do so, and as the next step to be taken, the European Union must find a way to expand this automatic exchange mechanism worldwide, for instance through institutional cooperation with organizations such as the OECD or the

[69] In the following link we can observe the rules each Member State has adopted to transpose the Directive into their national laws. https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32015L2376

United Nations. Only through this cooperation the EU can surpass the regional dimension of its measures and become a driving force of a global cooperative strategy against HTC.

Similarities and Differences between OECD BEPS Action 5 and the EU Directive 2015/2376

Following the analysis of the OECD Transparency Framework and the EU Directive 2015/2376, we can observe that both rules share several similarities but at the same time differ in many relevant aspects. In this section, we would like to comment on these aspects in order not only to better understand both instruments but also to examine the technical difficulties that the States subject to both rules (EU Member States) will have to face in order to comply with both exchange mechanisms.

Regarding the similarities between both instruments, it is clear that both rules share the conviction that greater transparency in the use of tax rulings is necessary to address Harmful Tax Practices and promote a Fair Tax Competition between States. As a matter of fact, both rules articulate a mechanism to enable the exchange of information on tax rulings between jurisdictions, aiming at ensuring that States have access to the necessary information to identify and properly react to Harmful Tax Practices.

However, from the previous analysis, it has become clear that both exchange systems differ in several important features.

Firstly, these mechanisms have been adopted by different international organizations, which has resulted in a disparity in their binding nature. While the EU Directive binds the Member States, the OECD Transparency Framework constitutes a *soft law* instrument that includes recommendations. This difference might be one of the most important ones as it undoubtedly influences the effectiveness of both instruments. Nevertheless, it must be noted that the OECD Transparency Framework, as we have seen, has been widely implemented regardless of its non-binding nature.

Secondly, and in line with the previous one, the subjective scope of both rules differs as well. While the Directive is only applicable to the EU Member States, the OECD Transparency Framework applies to all the Inclusive Framework Members worldwide.

Thirdly, there is an important distinction in the form of the exchange system. While the Transparency Framework has implemented a compulsory spontaneous exchange of information system, the EU has adopted a more ambitious system based on the automatic exchange of information, which provides States with far less discretionary powers.

Fourthly, and referring now to the actual content of both exchange systems, the Transparency Framework arguably has a narrower objective scope, as it defines only 6 categories of taxpayer-specific rulings that are subject to exchange, whereas the Directive provides that both "advance cross-border rulings" and "advance pricing arrangements" (broadly defined) are subject to exchange. As a result of this difference in the approach, the Directive includes, for example, the exchange of bilateral and multilateral APAs, while the Transparency Framework does not[70]. However, authors such as OBERSON argue that this distinction, at least theoretically, should not matter as the Transparency Framework specifically states that any other type of ruling that, although not included in the list, could give rise to BEPS in the absence of spontaneous exchange of information, could be subject to the Transparency Framework if the FHTP so agreed[71].

Fifthly, the temporal limitation of these instruments also differs to great extent. While the Transparency Framework introduces a far more complex and case-specific regulation, based on the definitions of *past* and *future rulings*, the EU Directive adopts a more general approach, differentiating between those rulings that are affected by the *retroactive clause* and those that aren't.

Last but not least, both exchange mechanisms adopt a different approach regarding the identification of the receiving jurisdictions. On one hand, the Transparency Framework establishes that information on a ruling must be communicated to those jurisdictions that can be affected by it, providing a set of specificities in relation to certain rulings. On the other hand, the Directive establishes that this information must be shared with all the Member States and even the EU Commission. The latter approach entails an important restriction to the discretionary powers of States and constitutes one of the big improvements of the Directive compared to the Transparency Framework.

[70] MORENO (2017), Tax Rulings: Intercambio De Información Y Ayudas De Estado En El Contexto Post-BEPS, pp. 166.
[71] OBERSON (2016), International Exchange Of Information On Rulings, pp. 531.

As we can see, while there are multiple similarities between both exchange mechanisms, there are also several differences to take into account. The coexistence of both rules and the referred differences between them have created a complex international exchange framework. This is especially true for those EU Member States that also belong to the OECD Inclusive Framework on BEPS, which, to comply with both instruments, must alter their exchange procedures depending on the identity of the receiving jurisdictions.

EU DIRECTIVE 2018/822 (DAC6)

So far, we have examined two of the most relevant international instruments regarding the exchange of tax rulings between States. However, the international legal framework applicable to the EU Member States regarding this topic goes beyond these two rules and is regulated in several other bodies of law. The characteristics of this dissertation do not allow for an exhaustive analysis of all these other rules, nevertheless, in this section we would like to briefly comment on one of the latest measures adopted by the European Union on this topic, the Directive 2018/822 of May 25th, 2018[72]. This rule, commonly known as DAC6, constitutes yet another amendment of the EU Directive 2011/16 on administrative cooperation in the field of taxation and intends to continue to adapt the legislation on tax transparency to enhance the means available to tax authorities to react to Harmful Tax Practices. (See Annex 2).

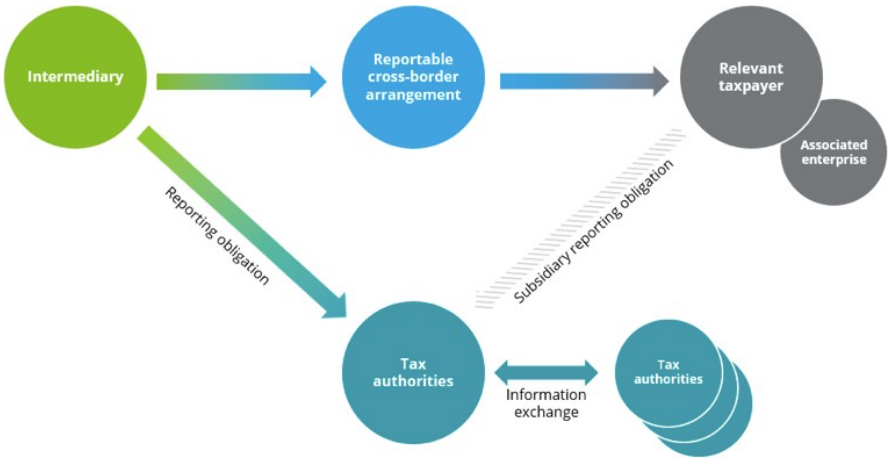
Following the recurrent demands made by the European Parliament to impose obligations on "intermediaries who assist in arrangements that may lead to tax avoidance or evasion"[73] , DAC6 has introduced the obligation for EU intermediaries[74] to report certain cross-border arrangements to tax authorities. More precisely, intermediaries must report a set of information on any cross-border arrangement they are involved with that concerns at least an EU Member State and that also contains at least one of the Hallmarks defined in the Directive. These Hallmarks identify five different features of a cross-border arrangement that, if present, indicate there is a potential risk of tax avoidance. (See Annex 3)

[72] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards to the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ L 139, 5.6.2018, p. 1–13).
[73] See Whereas nº 4 of the EU Council Directive 2018/822.
[74] According to article 3.21 of the Amended EU Council Directive 2011/16, added by the EU Directive 2018/822, an intermediary is "any person that designs, markets, organizes, or makes available for implementation or manages the implementation of a reportable cross-border arrangement".

In case an arrangement meets these requirements, the intermediary will have to report to the competent tax authority information such as the details of all the taxpayers, intermediaries, and anyone that could be affected by the transaction; details on the relevant hallmarks; the date when it was implemented or the value of the arrangement.
It must be noted that the Directive provides a few exceptions under which the intermediary might be exempted from having to communicate this information. In these situations, the obligation is transferred to the other intermediaries, if there are any, or to the taxpayer.

Finally, the Directive specifically provides that the reported information shall be automatically exchanged with all the other Member States[75], to provide them more information regarding these arrangements, which could ultimately allow them to better react to them and adopt the necessary measures to ensure a Fair Tax Competition within the internal market.
In the following flow diagram, we can observe a representation of the reporting procedure set forth in the Directive:

Figure 1: Flow diagram of the reporting procedure set forth in DAC6



Source: "Understanding DAC 6 | Deloitte Luxembourg | Analysis" (2021). Deloitte Luxembourg.

As we can observe, the above-mentioned Directive introduces a novel reporting obligation on intermediaries directly involved in arranging certain cross-border agreements. While it is true

[75] See articles 8ab.13 and 14 of the Amended EU Council Directive 2011/16, added by the EU Directive 2018/822, on the terms under which the competent tax authority has to share the reported information with the other Member States.

that this obligation can undoubtedly improve the transparency of these agreements, as they are reported to the competent tax authority and later to the other Member States, it is also true that it imposes a substantial administrative burden on these intermediaries. As a matter of fact, these obligated parties must keep track of a significant amount of information regarding these agreements and must also communicate it to the competent tax authority within a pretty narrow period of time, if they wish to avoid any infringement penalties. However, it must be noted that the rule has only been applicable for a few months (since July 1st, 2020, with an optional six-month extension due to the COVID-19 pandemic), that is why we are yet to really see how these intermediaries actually cope with this obligation.

4. IMPACT IN THE USE OF TAX RULINGS

In this final section, following the study made on the international instruments adopted to enhance the transparency of tax rulings through their exchange, we would like to attempt to analyze the impact these measures have had on the tax ruling practice of EU countries.

First of all, we must highlight that the scarcity of objective data on the number of tax rulings issued every year makes this analysis very difficult and, once again, proves that these types of tax arrangements continue to be surrounded by a climate of secrecy and confidentiality.

It is in this context that in this dissertation we have only been able to find data regarding the issuance of tax rulings of one EU Member State, the Grand Duchy of Luxembourg (perhaps surprisingly). It is true that a proper analysis of the impact these measures have had in the use of tax rulings in Europe would require more information. Nevertheless, we believe that the predominant role played by Luxembourg in the issuance of tax rulings to multinational enterprises in Europe makes this information especially valuable and even allows us to cautiously extrapolate it at an EU level.

Following this brief comment, we will now proceed to analyze the following table, containing the number of *Advance Tax Rulings* and *APAs* issued by Luxembourg's tax authorities in the past 5 years.

Table 2: Number of Advance Tax Rulings and APAs issued by the Grand Duchy of Luxembourg in the past 5 years

	2015	**2016**	**2017**	**2018**	**2019**
Advance Tax Rulings	539	452	231	142	92
APA	187	118	29	6	3
TOTAL	726	570	260	148	95

Source: Author's creation elaborated with the data provided in the Annex of the annual report of the Minister of Finances of Luxembourg of the years 2015-2019.

As we can observe, throughout the past 5 years Luxembourg's tax authorities have dramatically reduced the number of tax rulings issued every year, going from a total of 726 in 2015 to just 95 in 2019. In absolute numbers, this reduction is mainly due to the significant decrease in the number of Advance Tax Rulings issued every year, as this type of tax arrangement represents over 75% of the total number of tax rulings issued by Luxembourg. To be more precise, the number of Advance Tax Rulings issued has gone from 539 to 92 in just 5 years, which represents a total decrease of 82.94%.

To a lesser extent, this decrease is also due to the reduction in the number of APAs issued, which have gone from 187 in 2015 to just 3 in 2019. This reduction represents an astonishing decrease of 98.4% of the APAs issued by Luxembourg in only 5 years, which clearly shows that the resort to this tax instrument has become increasingly rare in the Grand Duchy.

Through this information, we can see that in the past five years there has been a clear decreasing trend in the number of tax rulings issued in Luxembourg. It is hard to know whether this is solely due to the measures adopted to increase the transparency of tax rulings through their exchange, or also due to other factors, such as the increasing reluctance of multinational enterprises to request them because they fear they will be involved in a future scandal like LuxLeaks, with the bad reputation this entails. In this dissertation, we are inclined to believe that this downward trend is not the result of any specific measure alone but instead the product of many factors that have put tax rulings in the spotlight.

5. CONCLUSIONS

The primary objective of this dissertation was the study of the legal framework applicable to the EU Member States regarding the international exchange of tax rulings, to understand whether these instruments have become more transparent and, if so, if this has had an impact on the tax ruling practice of European countries.
Following the analysis made throughout this thesis, we can draw several conclusions:

First. – In the past few years, tax rulings have become the center of an intense public debate because of scandals such as LuxLeaks, which have made clear that although these instruments provide much needed legal certainty, they are commonly used (or abused) to allow multinational enterprises to artificially reduce their tax burden, thus producing a massive tax avoidance.
Second. – Recognizing that the opacity that characterizes tax rulings plays a crucial role in the use of these tax instruments for tax avoidance purposes, international organizations at all levels have made their priority the adoption of measures oriented at increasing the transparency of these instruments, especially through the exchange of information between tax authorities. In this regard, it is important to highlight the work done by the OECD and the EU, which have been especially active in the adoption of several international instruments to promote and enable the exchange of tax rulings between states. These instruments, although different in nature and scope, share the conviction that the only way to transform the current international tax paradigm is through a global strategy based on the cooperation of as many countries as possible.
Third. – Regardless of the non-binding nature of the OECD Transparency Framework, this instrument has become the cornerstone of the international regulation on the exchange of tax rulings, mostly due to its implementation in 139 countries worldwide (well beyond the OECD Member States). As a result of this global implementation, throughout the past years, the compulsory spontaneous exchange of these tax arrangements has widespread all around the globe, consequently increasing their transparency. However, it is important to emphasize that such implementation is not yet complete, as shown by the FHTP reports, and thus it is crucial to intensify the efforts to fully implement the aforementioned system.
Fourth. – The EU has embarked on an ambitious regulatory process aiming at increasing the exchange of tax rulings between its Member States. This process has resulted in the creation of a binding legal framework that regulates the exchanges of these instruments within the

European Union. This legal framework constitutes an important milestone in the search for greater transparency of tax rulings and ultimately in the fight against Harmful Tax Practices, as it establishes an automatic exchange system that overcomes many of the practical difficulties present in the spontaneous exchange. Nevertheless, in this dissertation, we consider that regardless of the ambitious nature of the automatic exchange system set forth, its limited subjective scope (only applicable to the EU Member States) entails it is insufficient to tackle the issue from a global perspective and instead only does so at a European level. In consequence, we believe the European Union must try to find a way to expand this automatic exchange mechanism worldwide, for instance through institutional cooperation with organizations such as the OECD or the United Nations. Only through this cooperation the EU can surpass the regional dimension of its measures and become a driving force of a global cooperative strategy against Harmful Tax Practices.

Fifth. – While the implementation of the OECD Transparency Framework and the European automatic exchange system have undoubtedly increased the transparency of tax rulings, it is also important to note that their coexistence has created a very complex international legal framework for the EU Member States that also belong to the OECD Inclusive Framework on BEPS, as they must comply with both rules. As a matter of fact, to do so, these states must adjust their exchange procedure depending on the identity of the receiving jurisdictions, which obviously entails an important administrative burden and quite a few practical difficulties.

Sixth. – Finally, from the little information available regarding the evolution in the issuance of tax rulings, we notice that throughout the past few years there has been an important decrease in the number of Advance Tax Rulings and APAs issued. While it is hard to know whether this is solely due to the measures implemented to increase the transparency of these tax instruments or also due to other factors, it seems clear that these measures have had an impact on the tax ruling practice of European countries, as either fewer taxpayers choose to request this instrument or states are more reluctant to grant them.

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Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ L 336, 27.12.1977, p. 15–20)

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

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

Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards to the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ L 139, 5.6.2018, p. 1–13).

ANNEX 1: Members of the OECD Inclusive Framework on BEPS in 2021

1. Albania
2. Andorra
3. Angola
4. Anguilla
5. Antigua and Barbuda
6. Argentina
7. Armenia
8. Aruba
9. Australia
10. Austria
11. The Bahamas
12. Bahrain
13. Barbados
14. Belarus
15. Belgium
16. Belize
17. Benin
18. Bermuda
19. Bosnia and Herzegovina
20. Botswana
21. Brazil
22. British Virgin Islands
23. Brunei Darussalam
24. Bulgaria
25. Burkina Faso
26. Cabo Verde
27. Cameroon
28. Canada
29. Cayman Islands
30. Chile
31. China (People's Republic of)
32. Colombia
33. Congo
34. Cook Islands
35. Costa Rica
36. Côte d'Ivoire
37. Croatia
38. Curaçao
39. Czech Republic
40. Democratic Republic of the Congo
41. Denmark
42. Djibouti
43. Dominica
44. Dominican Republic
45. Egypt
46. Estonia
47. Eswatini
48. Faroe Islands
49. Finland
50. France
51. Gabon
52. Georgia
53. Germany
54. Gibraltar
55. Greece
56. Greenland
57. Grenada
58. Guernsey
59. Haiti
60. Honduras
61. Hong Kong, China
62. Hungary
63. Iceland
64. India
65. Indonesia
66. Ireland
67. Isle of Man
68. Israel
69. Italy
70. Jamaica
71. Japan
72. Jersey
73. Jordan
74. Kazakhstan
75. Kenya
76. Korea
77. Latvia
78. Liberia
79. Liechtenstein
80. Lithuania
81. Luxembourg
82. Macau, China
83. Malaysia
84. Maldives
85. Malta
86. Mauritius
87. Mexico
88. Monaco
89. Mongolia
90. Montenegro
91. Montserrat
92. Morocco
93. Namibia
94. Netherlands
95. New Zealand
96. Nigeria
97. North Macedonia
98. Norway
99. Oman
100. Pakistan
101. Panama
102. Papua New Guinea
103. Paraguay
104. Peru
105. Poland
106. Portugal
107. Qatar
108. Romania
109. Russian Federation
110. Saint Kitts and Nevis
111. Saint Lucia
112. Saint Vincent and the Grenadines
113. Samoa
114. San Marino
115. Saudi Arabia
116. Senegal
117. Serbia
118. Seychelles
119. Sierra Leone
120. Singapore
121. Slovak Republic
122. Slovenia
123. South Africa
124. Spain
125. Sri Lanka
126. Sweden
127. Switzerland
128. Thailand
129. Trinidad and Tobago
130. Tunisia
131. Turks and Caicos Islands
132. Turkey
133. Ukraine
134. United Arab Emirates
135. United Kingdom
136. United States
137. Uruguay
138. Viet Nam
139. Zambia

ANNEX 2: Amendments to the EU Council Directive 2011/16

Council Directive 2011/16/EU on Administrative Cooperation (DAC)					
DAC 1 **2011/16/EU**	**DAC 2** **2014/107/EU**	**DAC 3** **2015/2376/EU**	**DAC 4** **2016/881/EU**	**DAC 5** **2016/2258/EU**	**DAC 6** **2018/822/EU**
-Spontaneous exchanges. -Exchanges upon request. -Automatic exchange of information on 5 non-financial categories.	-Automatic exchange on certain financial account information (dividends, interests, …).	-Automatic exchange of information on: ▪ Advance cross-border rulings ▪ Advance pricing arrangement	-Automatic exchange of information on country-by-country reporting of multinational enterprises between tax authorities.	-Access by tax authorities to beneficial ownership information.	-Mandatory disclosure by intermediaries. -Automatic exchange of information of tax planning cross-border arrangements.

ANNEX 3: DAC 6 Hallmarks categories

DAC 6 CATEGORIES OF HALLMARKS	
Generic Hallmarks linked to the main benefit test (MBT)	Agreements involving: - A taxpayer that accepts to comply with conditions of confidentiality; - Fee agreements of intermediaries - Standardized documentation. For these arrangements, the MBT must be met. That is, the main or one of the main benefits of the arrangement is obtaining a tax advantage.
Specific Hallmarks linked to the MBT	Agreements involving: - The acquisition of a loss-making company; - Converting income into capital, gifts, or other types of revenues that are taxed at a lower level; - Circular transactions. Again, the MBT must be met.
Specific Hallmarks related to Cross-border transactions	Agreements involving: - Certain deductible cross-border payments; - Deductions for the same depreciation on the assets are claimed in more than one jurisdiction; - Relief from Double taxation; - Transfer of assets. Only the agreements involving certain deductible cross-border payments require the MBT to be met.
Specific Hallmarks concerning automatic exchange of information and beneficial ownership	Agreements that: - Undermine EU reporting obligations;

	- Those involving a non-transparent legal or beneficial ownership chain with the use of certain persons, arrangements, or structures. The MBT does not have to be met.
Specific Hallmarks concerning Transfer Pricing	Agreements including: - Unilateral safe harbor rules; - Hard-to-value intangibles; - Intra-group cross-border transfers. The MBT must be met.