

The Untold Tale of a Tax Rulings Haven

LEANDRA LEDERMAN*

Abstract. When the International Consortium of Investigative Journalists (ICIJ) broke the “LuxLeaks” scandal, it revealed hundreds of billions of dollars in secret deals granted by the small country of Luxembourg to large multinational companies such as Apple, Disney, and Pepsi. These sweetheart deals, in the form of Luxembourg tax rulings, allowed many name-brand companies to dodge huge amounts of tax that would otherwise be due to the United States or other countries. Surprisingly, a tiny tax agency had produced thousands of tax rulings in the course of a few years.

This Article makes three major contributions. First, it explores where Luxembourg’s informal tax-rulings process came from and how it became so prolific. It draws on government documents and news stories to tell the story of the importation and dramatic growth of Luxembourg’s rulings process, with players that include Dutch tax advisers, a man nicknamed “Monsieur Ruling,” and Big Four accounting firms.

Second, it makes the original argument that three factors were critical in attracting so many large companies to seek Luxembourg tax deals: (1) amenability of the tax administration, (2) trust in the Luxembourg government, and (3) secrecy. The Article shows that once these factors changed, Luxembourg’s rulings volume plummeted. The three factors of amenability, trust, and secrecy also reappear in the recent “LuxLetters” scandal, involving an alleged new procedure for under-the-radar rulings.

Third, the Article examines the aftermath of LuxLeaks. It examines the timing of the codification of Luxembourg’s new rulings process in relation to the ICIJ investigation. And it teases apart legal changes that may have contributed to the precipitous drop in Luxembourg tax rulings. It also explores whether the funds previously flowing into Luxembourg arrangements simply moved elsewhere in the world.

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Introduction

The LuxLeaks scandal catapulted the small European country of Luxembourg into international news.¹ LuxLeaks involved the release of hundreds of previously secret tax rulings issued by the Luxembourg tax administration,² reflecting hundreds of billions of dollars of special deals.³ Antoine Deltour, a citizen of France and former junior auditor at the Luxembourg office of the Big Four accounting firm PwC, was accused of providing to Édouard Perrin, a French journalist, documents relating to 340 taxpayers.⁴ Perrin ultimately collaborated with the International Consortium of Investigative Journalists (ICIJ).⁵ Raphaël Halet, another former PwC employee, was accused of leaking additional documents to Perrin.⁶ The ICIJ not only wrote headline news articles about what the rulings revealed, it also published them in a searchable online database.⁷

LuxLeaks and the events that followed revealed that Luxembourg had a previously opaque process that had granted thousands of beneficial tax rulings to multinational companies⁸—including United States (U.S.) companies such as Amazon, Apple, and Verizon.⁹ These rulings reportedly saved companies

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1. JAKE BERNSTEIN, *SECRECY WORLD: INSIDE PANAMA PAPERS INVESTIGATION OF ILLICIT MONEY NETWORKS AND THE GLOBAL ELITE 200* (2017) (“While largely ignored in the United States, the Lux Leaks revelations, published on November 5, 2014, shook Europe.”).
 2. See Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1, 8 (2017).
 3. Leslie Wayne et al., *Leaked Documents Expose Global Companies’ Secret Tax Deals in Luxembourg*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 5, 2014), <https://www.icij.org/investigations/luxembourg-leaks/leaked-documents-expose-global-companies-secret-tax-deals-luxembourg/> [<https://perma.cc/KEE8-LPLV>].
 4. Seamus Kearney, *Everything You Need to Know About the LuxLeaks Scandal*, EURONEWS (Apr. 26, 2016), <https://www.euronews.com/2016/04/26/everything-you-need-to-know-about-the-luxleaks-scandal> [<https://perma.cc/A2LJ-HQGN>].
 5. Édouard Perrin, *This Story is Global, It Can Only Be Told with a Global Eye*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 5, 2014), www.icij.org/investigations/luxembourg-leaks/story-global-it-can-only-be-told-global-eye/ [<https://perma.cc/4DJM-CUMU>].
 6. Kearney, *supra* note 4.
 7. See *Explore the Documents: Luxembourg Leaks Database*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/luxembourg-leaks/explore-documents-luxembourg-leaks-database/> [<https://perma.cc/HY5C-3THJ>] (last visited Jan. 18, 2024) [hereinafter ICIJ].
 8. See *infra* note 41.
 9. Mike Bird, *Here’s A Full List of Companies That Allegedly Have Shady Tax Deals With Luxembourg*, BUS. INSIDER (Nov. 6, 2014), <https://www.businessinsider.com/full-list-every-company-named-in-the-luxembourg-secret-tax-deal-database-2014-11> [<https://perma.cc/CW9X-UC8P>] (also listing IKEA, J.P. Morgan, Pepsi Bottling Group, Procter & Gamble, and Staples, among others).

billions of dollars.¹⁰ Rather amazingly, a single tax administrator, Marius Kohl, had signed most of the numerous rulings.¹¹ The *Wall Street Journal* quoted a Luxembourg tax expert as stating, “[t]he corporate structures Mr. Kohl approved account for up to 80% of Luxembourg’s €1.5 billion in annual corporate tax revenue . . .”¹² Tax advisers had profited, too, allegedly receiving about 50,000 Euros per ruling.¹³ (Currently, the Euro is worth a little more than the dollar.¹⁴)

A tax ruling is taxpayer-specific guidance that allows the taxpayer to obtain assurance from the tax authority about the tax treatment of a transaction, typically before undertaking the transaction.¹⁵ The certainty it provides, in the form of reduced tax risk, is sufficiently valuable that even in countries where the tax administration charges a fee (such as the United States), many taxpayers request rulings.¹⁶

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10. Wayne et al., *supra* note 3 (“Pepsi, IKEA, FedEx and 340 other international companies have secured secret deals from Luxembourg, allowing many of them to slash their global tax bills while maintaining little presence in the tiny European duchy, leaked documents show. These companies appear to have channeled hundreds of billions of dollars through Luxembourg and saved billions of dollars in taxes. . . .”); see also Dina Gusovsky, *Taxes, multinational firms & Luxembourg—revealed*, CNBC (Nov. 7, 2014), <https://www.cnbc.com/2014/11/06/taxes-multinational-firms-luxembourg-revealed.html> [<https://perma.cc/HSK4-CJY3>] (“international tax attorney Steven Plotnick . . . said firms establishing tax structures in Luxembourg sometimes achieve significant tax reductions. For example, the Luxembourg tax on \$50 million of interest income running through the country via back-to-back loans would be less than \$100,000. By comparison, the tax in the United States would range from \$6 million to \$18 million.”).
 11. See *infra* notes 125-126 and accompanying text. It is not clear how much oversight he received. See *infra* text accompanying notes 132-133; *infra* text accompanying note 224.
 12. Matthew Karnitschnig & Robin van Daalen, *Business-Friendly Bureaucrat Helped Build Tax Haven in Luxembourg*, WALL ST. J. (Oct. 21, 2014), <http://www.wsj.com/articles/luxembourg-tax-deals-under-pressure-1413930593> [<https://perma.cc/4G74-6NQQ>] (quoting Alain Steichen).
 13. Bernard Thomas, *La cinquième colonne*, LÉTZEBUERGER LAND (original in French) (Nov. 14, 2014), <http://www.land.lu/page/article/751/7751/FRE/index.html> [<https://perma.cc/3N8C-DUH9>] (“Un ruling . . . serait . . . facturé à quelque 50 000 euros par les ingénieurs fiscaux.”).
 14. See Currency, <https://www.currency.me.uk/convert/eur/usd> [<https://perma.cc/XR8U-3CTM>] (last visited Jan. 18, 2024).
 15. CARLO ROMANO, *ADVANCE TAX RULINGS AND PRINCIPLES OF LAW: TOWARDS A EUROPEAN TAX RULINGS SYSTEM?* 78 (2002).
 16. See Benjamin Alarie, Kalmen Datt, Adrian Sawyer & Greg Weeks, *Advance Tax Rulings in Perspective: A Theoretical and Comparative Analysis*, 20 N.Z. J. TAX’N L. & POL’Y 362, 373 (2014) (“Where advance rulings are binding, at least on the revenue authority, the conventional approach suggests that they can be valuable to taxpayers in that the rulings enable them to plan their affairs in a clear understanding of their tax liability.”) (footnote omitted); *id.* at 379 (“On this view, it was expected that the cost of the ruling
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There are two main types of rulings issued to specific taxpayers: (1) advance tax rulings (also termed “letter rulings”) and (2) Advance Pricing Agreements (APAs).¹⁷ U.S. letter rulings issued by the Internal Revenue Service (IRS) are often called “private letter rulings” or PLRs.¹⁸ The IRS explains that a PLR “is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer’s specific set of facts. A PLR is issued to establish with certainty the federal tax consequences of a particular transaction before the transaction is consummated or before the taxpayer’s return is filed.”¹⁹ While PLRs can apply to an array of types of transactions, APAs address issues of intracompany (“transfer”) pricing between related companies. APAs “determine[], in advance of controlled transactions, an appropriate set of criteria . . . for the determination of the transfer pricing for those transactions over a fixed period of time.”²⁰

There is nothing inherently wrong with tax rulings. They increase certainty for both the taxpayer and the tax administration,²¹ and many countries use them.²² In principle, the parties negotiating rulings should have adverse interests, with the tax administration seeking to prevent the taxpayer

would often be more than offset by the advantages associated with reduction (or elimination) of the risk of unexpected future tax liability.”)

17. This article uses the term “ruling” or “tax ruling” to refer to both letter rulings and APAs. See Allison Christians, *Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time*, 76 TAX NOTES INT’L 1123, 1124 (2014) (stating that “advance pricing agreements . . . are a kind of private letter ruling”). Transfer pricing is briefly explained below. See *infra* text accompanying notes 157-162.
18. See Kimberly A. Butlak, *All’s Fair in Love, War, and Taxes: Does the United States Promote Fair Tax Competition in A Global Marketplace Consistent with European Community and Organisation for Economic Co-Operation and Development Recommendations through Its Advance Ruling Program?*, 13 IND. INTL. & COMP. L. REV. 99, 99 (2002) (“[A]dvance tax rulings in the United States are statements issued by the Internal Revenue Service (IRS) in response to a taxpayer’s request . . . [and are] referred to as Private Letter Rulings (PLRs).”).
19. IRS, *Understanding IRS Guidance - A Brief Primer*, <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> [<https://perma.cc/8M55-RSUV>] (last visited Jan. 18, 2024).
20. OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* 23 (2017), <https://dx.doi.org/10.1787/tpg-2017-en> [<https://perma.cc/G6N5-97SQ>] (defining Advance Pricing Arrangement (APA) and also stating that “[a]n advance pricing arrangement may be unilateral involving one tax administration and a taxpayer or multilateral involving the agreement of two or more tax administrations.”).
21. Norman A. Sugarman, *Federal Tax Rulings Procedure*, 10 TAX L. REV. 1, 5 (1954); see also Emily Cauble, *Questions the IRS Will Not Answer*, 97 IND. L.J. 523, 525 (2022) (“obtaining a letter ruling affords certainty to the taxpayer.”).
22. See *infra* text accompanying note 55 (listing some of the countries exchanging summaries of past tax rulings).

from reducing the tax base in that country. However, to attract investment,²³ governments can also use tax rulings to provide special, even secret, deals to select taxpayers.²⁴ Moreover, a government can use tax rulings to shift profits out of other jurisdictions that would otherwise collect tax revenue, increasing its own tax base by offering reduced tax liability on the profits shifted. As one example, the ICIJ reported that

[t]he records show . . . that Memphis-based FedEx Corp. set up two Luxembourg affiliates to shuffle earnings from its Mexican, French and Brazilian operations to FedEx affiliates in Hong Kong. Profits moved from Mexico to Luxembourg largely as tax-free dividends. Luxembourg agreed to tax only one quarter of 1 percent of FedEx's non-dividend income flowing through this arrangement – leaving the remaining 99.75 percent tax-free.²⁵

In addition, as tax scholar Omri Marian has explained, a country can insert itself between two other countries, allowing a multinational taxpayer to avoid taxation by either of the two other jurisdictions.²⁶ He has persuasively argued, based on a sample of the leaked rulings, that Luxembourg did just that, doing what he terms “manufacturing” of tax arbitrage that saved multinational entities significant amounts of taxes in return for a payment to Luxembourg.²⁷

The payment to Luxembourg took the form of a modest amount of tax on amounts passing through Luxembourg, although several observers have described the payment as akin to a fee for service.²⁸ Luxembourg was not a

23. See Lilian V. Faulhaber, *The Trouble with Tax Competition: From Practice to Theory*, 71 TAX L. REV. 311, 325-26 (2018) (“The use of tax policy to compete for investors and other resources has existed for centuries.”); cf. Allison Christians & Marco Garofalo, *Tax Competition as an Investment Promotion Tool* in J. ANTHONY VANDUZER & PATRICK LEBLOND, EDS., PROMOTING AND MANAGING INTERNATIONAL INVESTMENT: TOWARDS AN INTEGRATED POLICY 178 (2020) (“It is not always clear whether a state’s use of its tax system to lure and promote investment should be seen as engaging in healthy or harmful tax competition.”).

24. Christians, *supra* note 17, at 1124 (referring to “a known issue for international tax law: far too much of it seems to involve secret deals among specific taxpayers and governments, to the detriment of the public at large.”); Ruth Mason, *Identifying Illegal Subsidies*, 69 AM. U. L. REV. 479, 515 (2019) (“[T]ax rulings represent an ideal mechanism for governments to deliver benefits to a favored taxpayer while denying similar treatment to the taxpayer’s competitors.”).

25. Wayne et al., *supra* note 3.

26. Marian, *supra* note 2, at 23-24.

27. *Id.* at 3 (“This Article labels Luxembourg’s administrative behavior as ‘arbitrage manufacturing.’”).

28. See, e.g., Neil Chenoweth, *How hidden billions flow through Luxembourg* (Nov. 8, 2014), <https://www.afr.com/policy/tax-and-super/how-hidden-billions-flow-through-luxembourg-20141108-11iz37> [<https://perma.cc/2MMJ-KS34>] (“This is a tax, but it looks more like a flat fee—a straight charge by Luxembourg for the right to operate a tax-free trading business in Europe.”); Marian, *supra* note 2, at 2 (LACD [Luxembourg’s Inland Revenue] earned what is best described as fees for tax-avoidance services.”).

low-tax country, as its applicable statutory tax rate amounted to about 29% during the period of the rulings in the ICIJ database.²⁹ However, companies were able to achieve a much lower effective tax rate there via a ruling that allowed only a small portion or “margin” of the funds passing through Luxembourg to be subject to tax,³⁰ as the ICIJ’s FedEx example illustrates.³¹ On French television, journalist Édouard Perrin’s show *Cash Investigation* showed a document with a “net taxable margin of .125%” annually.³² Similar, a 1989 Luxembourg administrative Circular (a form of published tax guidance³³) had also authorized a taxable margin as low as .125%.³⁴ However, Professor Marian found even lower rates in his study of the leaked rulings, with “taxable margins . . . as low as 0.015625 percent.”³⁵ Similarly, LuxLeaks whistleblower Antoine Deltour stated that “[a]s an auditor, I worked for a client with an effective tax rate of about 3%. And journalists who surveyed the other [LuxLeaks] documents calculated an effective rate of 0.0156 per cent, or zero.”³⁶

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29. Omri Marian, *Is Something Rotten in the Grand Duchy of Luxembourg?*, 84 TAX NOTES INT’L 281, 283 (2016) (“Luxembourg’s corporate tax rates [were] . . . about 29 percent combined national and local rate during the period relevant to the leaks . . .”).
30. See Marian, *supra* note 2, at 38 (“Effectively, a margin determination is an agreement by Luxembourg to a fixed formula that determines, in advance, the amount of taxes to be paid by the [taxpayer] in Luxembourg. . . . The determination of the taxable spread seems to depend solely on the face amount of financing made through Luxembourg.”).
31. In the FedEx example, the base subject to tax in Luxembourg reportedly did not include profits moved from affiliate companies in Mexico as dividends, only the non-dividend income. And Luxembourg agreed to tax only one quarter of 1 percent of the non-dividend income. The result of an arrangement like this is a small amount of tax, despite a high statutory tax rate.
32. *Cash Investigation: Paradis fiscaux: les petits secrets des grandes entreprises* (France 2 television broadcast 2015) [hereinafter *Paradis Fiscaux*] (original in French), <https://www.dailymotion.com/video/x3jftzl> [<https://perma.cc/8RHA-2XZM>]. The document containing this language is shown on a laptop at 31:51.
33. “The heads of the Luxembourg tax authorities regularly issue circulars setting out the administration’s official position on certain tax issues. Circulars are doctrinal opinions of the tax authorities, and are therefore enforceable in proceedings involving them.” Alain Goebel, Thierry Lesage, Bruno Gasparotto, Marie Demmerlé & Sophie Richard, *2023 GTDT: Tax Controversy Luxembourg*, 5 (2024), https://www.arendt.com/upload/docs/application/pdf/2022-09/tax_controversy_2023_-_luxembourg_chapter.pdf [<https://perma.cc/9F42-Y6U5>]. Circulars are therefore public, general guidance, unlike a tax ruling, which is tailored guidance issued to the requesting taxpayer.
34. See Commission Decision 2003/438, 153 O.J.E.U. 40, 48 (June 20, 2003) (the withdrawn Circular stated that “acceptable commercial profit of a Luxembourg finance company for tax purposes is ¼% (0,25%) of the amount of loans granted and, if the financial risk is covered by statutory collateral, may be further reduced to 1/8% (0,125%).”).
35. Marian, *supra* note 29, at 286.
36. Antoine Deltour, *Whistleblowing on Luxembourg’s Tax Practices, in MAKING TRANSPARENCY POSSIBLE: AN INTERDISCIPLINARY DIALOGUE* 82 (Roy Krovel & Mona Thowsen eds., 2019).

Other scholars have written about the LuxLeaks scandal and the rulings themselves.³⁷ Such rulings raise concerns about harmful tax competition.³⁸ A companion article argues that the best way to prevent tax abuse via rulings is to require transparency, including government publication of tax rulings (with taxpayers' identifying details redacted).³⁹ What is missing from the literature is an analysis of how the small country of Luxembourg developed such a substantial—yet opaque and uncodified—tax-rulings process, and how the volume of Luxembourg rulings grew to dwarf the number of rulings issued by much larger countries.⁴⁰ This Article does that, and it also identifies three elements that were vital to the success of Luxembourg's rulings system.

Part I of this Article analyzes how the supply and demand by multinationals for Luxembourg tax rulings arose starting in the early 1990s, including the important role of the Dutch. Part II focuses on the willingness of Luxembourg's tax administration to issue tax rulings in an informal process and of tax advisers to accept those rulings. Part III examines how this rulings process came to an end and what may have replaced it. The Article concludes by identifying three principal factors that combined to make Luxembourg a large supplier of tax rulings sought by multinational enterprises.

I. How the Deals Began

Because of LuxLeaks and subsequent events, the public now knows that Luxembourg's tax office issued thousands of tax rulings over a period of several years.⁴¹ That figure is surprising, particularly considering Luxembourg's small size.⁴² Luxembourg's tax administration is smaller than

37. See, e.g., Christians, *supra* note 17; Tracy A. Kaye, *Tax Transparency: A Tale of Two Countries*, 39 FORDHAM INT'L L.J. 1153 (2016); Marian, *supra* note 2; Marian, *supra* note 29; Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532, 555-58 (2018); Kyle Richard, *Are All Tax Rulings State Aid? Examining the European Commission's Recent State Aid Decisions*, 18 HOUS. BUS. & TAX L.J. 1, 10-11 (2018).

38. Faulhaber, *supra* note 23, at 332-34.

39. Leandra Lederman, *Avoiding Scandals Through Tax Rulings Transparency*, 50 FLA. ST. L. REV. 219 (2023).

40. See *infra* text accompanying note 55 (showing comparative volume of rulings exchanged by select OECD countries).

41. See *LuxLetters, FAQ: Does Luxembourg still grant rulings to companies?* 2, GOUVERNEMENT.LU (July 2, 2021), <https://gouvernement.lu/dam-assets/fr/dossiers/luxletters/10297-ME-luxletters-FAQ-Rulings-EN.pdf> [<https://perma.cc/9XCK-63DR>] ("Since 2016, around 11,500 rulings were exchanged [by Luxembourg] with other European and non-European tax administrations. The vast majority of these exchanges (around 10,600) relate to rulings granted before 2016.") [hereinafter *LuxLetters, FAQ*].

42. In 2014, the *Wall Street Journal* described the country as follows: "Nestled in the hill country between Belgium, France and Germany, Luxembourg ... is smaller than Rhode
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those of surrounding countries,⁴³ and the office issuing most of the rulings, Sociétés 6, reportedly only had about 50 employees.⁴⁴ In addition, one man signed most of Luxembourg’s numerous rulings.⁴⁵

The ICIJ questioned how that tax office was able to issue so many rulings with such a small staff.⁴⁶ In fact, when Luxembourg’s tax administration later collected past rulings in order to exchange summaries of them with other countries under Organisation for Economic Cooperation and Development (OECD) rules,⁴⁷ it did not summarize them all itself, perhaps due to how many there were.⁴⁸ It actually enlisted the help of taxpayers and tax advisers in summarizing the rulings they had received from the tax administration:

Island, with about half the population.” Karnitschnig & van Daalen, *supra* note 12. The U.S. Department of State observed in 2021 that “[d]espite its small landmass and small population (634,700), Luxembourg is the second-wealthiest country in the world when measured on a Gross Domestic Product (GDP) per capita basis.” *2021 Investment Climate Statements: Luxembourg*, U.S. DEPT OF STATE, <https://www.state.gov/reports/2021-investment-climate-statements/luxembourg/> [<https://perma.cc/DNU8-FYCZ>] (last visited Jan. 18, 2024).

43. 2023 OECD data shows for many countries’ tax administrations the number of full-time equivalent staff (FTEs) devoted to “enforced debt collection and related functions” and “other functions.” OECD, *Tax Administration 2023: Comparative Information on OECD and other Advanced and Emerging Economies Data Tables Annex A 131* (2023), https://www.oecd-ilibrary.org/taxation/tax-administration-2023_0d09309f-en [<https://perma.cc/8KPK-BRD6>]. In 2021, Luxembourg had 70 FTEs for enforced debt collection and related functions (EDC) and 274 FTEs for other functions. *Id.* By contrast, for EDC, Luxembourg’s surrounding countries of Belgium, France, and Germany had 1,536; 8,177; and 8,320 FTEs, respectively. *Id.* For “other functions,” those countries had 2,024; 12,838; and 37,934 FTEs, respectively. *Id.* The U.K. had 3,374 FTEs for EDC and 22,141 for other functions. *Id.* at 132. The United States—a much larger country—had 8,772 FTEs for EDC and 18,289 FTEs for other functions. *Id.*
44. *See infra* text accompanying note 124.
45. *See infra* text accompanying notes 125-126.
46. *See infra* text accompanying note 272.
47. Exchanges under the OECD’s Base Erosion and Profit Shifting (BEPS) project began in 2016, with respect to past rulings. OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5—2015 Final Report 67* (2015), <https://dx.doi.org/10.1787/9789264241190-en> [<https://perma.cc/95A8-PHCF>]. The United States is a member of the OECD. *See* OECD, *List of OECD Member countries – Ratification of the Convention on the OECD*, <https://www.oecd.org/about/document/ratification-oecd-convention.htm> [<https://perma.cc/AK7S-AL82>] (last visited Feb. 23, 2024).
48. *See* OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, *Harmful Tax Practices—Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5 190* (2017) (describing the process of assembling a database and explaining that “[t]he tax administration staff had to go manually through all the rulings in the database to determine if they were in the scope of the transparency framework. In order to assist in accelerating the identification of past rulings, taxpayers or their advisors were contacted and asked to identify for each relevant ruling whether or not it was in scope.”), <https://www.oecd-ilibrary.org/taxation/harmful-tax->
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A national template was created by the tax administration in April 2016 in order to meet the requirements of the transparency framework. *This template is available for taxpayers or their advisors on the tax administration's website.* If the ruling was in scope, the form required the classification into the relevant categories and the verification that the ruling was within the period defined as “past ruling.”⁴⁹

The Luxembourg tax administration then reviewed the forms.⁵⁰ Only “where the form was not completed by the taxpayer or advisor, the tax administration staff classified the ruling using information contained in the ruling.”⁵¹

The OECD statistics on the number of rulings subject to exchange come from its anti-tax-avoidance project known as the Base Erosion and Profit Shifting (BEPS) Project.⁵² This part of the BEPS project was known as Action 5, which is on “harmful tax practices.”⁵³ The statistics show that most countries, aside from the Netherlands—which Luxembourg used as a model—did not identify nearly as many “past rulings”⁵⁴ as Luxembourg did. Table 1 makes that comparison.

practices-peer-review-reports-on-the-exchange-of-information-on-tax-rulings_9789264285675-en [https://perma.cc/K3M7-Y9X5] [hereinafter OECD, 2017].

49. *Id.* at 190-91 (footnote omitted) (emphasis added).

50. *Id.* at 191.

51. *Id.*

52. For an explanation of the BEPS project, see OECD, *What is BEPS?*, <https://www.oecd.org/tax/beps/about/> [https://perma.cc/4CJQ-BKU9] (“Working together within OECD/G20 Inclusive Framework on BEPS, over 140 countries and jurisdictions are collaborating on the implementation of 15 measures to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment.”) (last visited Jan. 29, 2024).

53. See OECD, *BEPS Actions*, <https://www.oecd.org/tax/beps/beps-actions/> [https://perma.cc/R2VM-H2ZS] (listing and labelling the 15 Actions) (last visited Jan. 18, 2024).

54. The OECD generally defined “past rulings” as qualifying rulings issued between January 1, 2010 and March 31, 2016. However, the specific timeframe does vary by country. For all countries included in Table 1, “past rulings are any tax rulings within the scope that are issued either: (i) on or after 1 January 2014 but before 1 April 2016; or (ii) on or after 1 January 2010 but before 1 January 2014, provided they were still in effect as at 1 January 2014.” OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, *Harmful Tax Practices—2018 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5* (2019), <http://www.oecd.org/tax/beps/harmful-tax-practices-2018-peer-review-reports-on-the-exchange-of-information-on-tax-rulings-7cc5b1a2-en.htm> [https://perma.cc/3YK7-743Z], at e.g., 264 (Luxembourg), 447 (United States).

The Netherlands has long had an active tax rulings practice. See *infra* text accompanying notes 88-104.

Tbl. 1. Number of Past Rulings Subject to BEPS Action 5 (Selected Countries)⁵⁵

Country	Past Rulings
Australia	202
Austria	59
Belgium	586
Canada	12
France	45
Germany	30
Ireland	29
Italy	58
<i>Luxembourg</i>	<i>1,922⁵⁶</i>
The Netherlands	2,204
Norway	1
Poland	84
Portugal	24
Spain	146
Sweden	28
Turkey	3
United Kingdom	599
United States	114

Note that not all of Luxembourg’s prior tax rulings are included there. The OECD’s 2017 report includes a statement with respect to Luxembourg that “[a]s at 18 October 2017, the process to identify all past rulings had been

55. OECD, *supra* note 54, at 57, 149, 162, 200, 212, 263, 298, 310, 335, 340, 404, 412, 417, 432, 441, 446. The countries shown in the table are a subset of those discussed in the report. Some of the figures for previous years are different in earlier reports. *See, e.g.,* OECD, *Harmful Tax Practices—2017 Peer Review Reports on the Exchange of Information on Tax Rulings Inclusive Framework on BEPS: Action 5* (2018), <https://www.oecd.org/tax/beps/harmful-tax-practices-2017-peer-review-reports-on-the-exchange-of-information-on-tax-rulings-9789264309586-en.htm> [<https://perma.cc/9D2W-H599>] [hereinafter OECD, 2018] at 328 (stating that the Netherlands issued 2,198 past rulings for the applicable period, not 2,204, and 213 rulings for 2017, not 214), 344 (stating that Norway issued no rulings in 2017, not 1).

56. This is the figure reported in 2019. The figure reported previously was larger. *See infra* note 57 and accompanying text.

completed. 7894 exchanges on past rulings had occurred.”⁵⁷ Of course, it is possible that many of these past tax rulings were unlike the approximately 500 rulings⁵⁸ revealed by LuxLeaks. For example, leakers may select documents to leak that are particularly newsworthy.⁵⁹ Nonetheless, the high volume of tax rulings issued by Luxembourg is remarkable.

A. The Demand for Tax Rulings

How did the demand for Luxembourg rulings arise? A bit of history helps answer that question. Luxembourg is a small country, surrounded by France, Germany, and Belgium.⁶⁰ When Luxembourg’s significant reliance on steel production⁶¹ ceased to be sustainable in about the late 1970s,⁶² the country focused on finance.⁶³ Luxembourg also offered bank

57. OECD, 2017, *supra* note 48, at 196 (statement in the section on the “Jurisdiction’s response and recent developments”) (emphasis added). The main part of the report on Luxembourg lists 5,600 past rulings. *Id.* at 189. Perhaps Luxembourg initially identified more rulings than were subject to the scope of Action 5 of BEPS. “The [BEPS] framework covers six categories of rulings: (i) rulings related to preferential regimes; (ii) cross border unilateral advance pricing arrangements (APAs) or other unilateral transfer pricing rulings; (iii) rulings giving a downward adjustment to profits; (iv) permanent establishment (PE) rulings; (v) conduit rulings; and (vi) any other type of ruling where the FHTP agrees in the future that the absence of exchange would give rise to BEPS concerns.” OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5—2015 Final Report* 10 (2015), https://www.oecd-ilibrary.org/taxation/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report_9789264241190-en [<https://perma.cc/2T2Z-FTCC>].

58. *See infra* notes 273-275 and accompanying text (referring to publication of over 500 rulings).

59. *See* Oei & Ring, *supra* note 37, at 570 (“The incompleteness of leaked data may depend on what data the leaker is able and willing to take and leak, but it may also depend on what information the press or other information intermediaries are willing to share or publish.”).

60. *See* Karnitsching & van Daalen, *supra* note 12.

61. Paul Zahlen, *The Luxembourg Economy: An Eventful History* 113 (“Despite ... significant fluctuations in the added value of the steel industry, it was this industrial sector that largely determined the growth rate of the Luxembourg economy as a whole during the ‘thirty glorious years’ (1945-1975).”).

62. *Id.* at 114 (“In 1983, production of raw steel amounted to only 3.2 million tonnes (compared with 6.45 million in 1974), having dropped right down to its 1955 level.”).

63. Vivienne Walt, *Luxembourg: Tough times for a favorite tax haven*, FORTUNE (Jan. 22, 2015), <https://fortune.com/2015/01/22/luxembourg-tough-times-for-a-favorite-tax-haven/> [<https://perma.cc/NN4A-TY8P>] (“When the country’s bedrock steel industry collapsed in the 1970s, Luxembourg began offering companies huge incentives to move there. Sweeteners included streamlined bureaucracy and, more crucially, deep discounts on the country’s corporate tax rate of 29%.”); Antonio Baquero, Maxime Vaudano & Cecilia Anesi, *Shedding Light on Big Secrets in Tiny Luxembourg*, Organized
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secrecy.⁶⁴ That policy meant that Luxembourg would not notify the tax authority of another country when one of that country's citizens opened a bank account in Luxembourg.⁶⁵ "As one Luxembourgish academic put it, 'we thrive on the frauds of Germany, France and Belgium.'"⁶⁶ Luxembourg's bank-secrecy policy lasted several decades⁶⁷ and reportedly played a major part in the growth of its financial sector.⁶⁸

In the early 1990s, Luxembourg began to attract numerous foreign corporations.⁶⁹ One "reason was that Luxembourg was quick to adopt an E.U.

Crime and Corruption Reporting Project (Feb. 8, 2021), <https://www.occrp.org/en/openlux/shedding-light-on-big-secrets-in-tiny-luxembourg> [<https://perma.cc/9QX9-2WS6>] ("When the country's steel industry collapsed in the mid-1970s, finance became its main economic engine.").

64. See Baquero et al., *supra* note 63 ("Starting in the late 1920s, Luxembourg's government took inspiration from Switzerland, which was busy parlaying a long tradition of banking secrecy into a major international industry."); see also Marc Fassone, *Key Dates In Luxembourg Finance 1981: adoption of banking secrecy*, DELANO (Aug. 17, 2022), <https://delano.lu/article/1981-the-adoption-of-banking-s> [<https://perma.cc/6M25-N7J8>] ("Luxembourg banking secrecy owed its origin to Article 458 of the Criminal Code... Its extension to the banking world was based on case law interpretation, without it being clear whether its scope was specific or general. The law of 23 April 1981 on the banking sector formally extended it to the banking professions.").
65. Francesco Guarascio, *After Years of Pressure, Luxembourg Drops Bank Secrecy Rules*, REUTERS (Oct. 14, 2014), <https://www.reuters.com/article/uk-eurozone-economy-banks/after-years-of-pressure-luxembourg-drops-bank-secrecy-rules-idUKKCN0I3ISO20141014> [<https://perma.cc/2F8B-5UBB>] ("Luxembourg's decision [to end bank secrecy] will leave Austria as the only country in the European Union with rules that allow an EU citizen to open a bank account in another EU member state without the tax authority in the person's country of origin being informed.").
66. Jeanne A.K. Hey, *Luxembourg: Where Small Works (and Wealthy Doesn't Hurt)*, in SMALL STATES IN WORLD POLITICS: EXPLAINING FOREIGN POLICY BEHAVIOR 81 (2003) (quoting Interview by Jeanne A.K. Hey of Emil Haag, Luxembourg City, May 22, 2000).
67. Jim Brunsten, *Luxleaks: Luxembourg's Response to an International Tax Scandal*, FIN. TIMES (June 23, 2017), <https://www.ft.com/content/de228b90-3632-11e7-99bd-13beb0903fa3> [<https://perma.cc/DJG7-4DWZ>] (stating that after the OECD "branded the country as non-compliant with international standards on tax transparency" in 2013, Luxembourg "set about reforming its tax laws, effectively bringing an end to banking secrecy.").
68. See Susan Alexander, *An Intellectual Capital Audit of the Grand Duchy of Luxembourg* 15 (2006), http://www.chairedelimmateriel.universite-paris-saclay.fr/wp-content/uploads/2010/08/s4_p1.pdf [<https://perma.cc/Y7RV-8PTT>]; Vanessa Houlder, *Luxembourg Tax Regime: Under Siege*, FIN. TIMES (July 23, 2014), <https://www.ft.com/content/b429f2c4-124f-11e4-a581-00144feabdc0> [<https://perma.cc/GJT9-BP2G>].
69. Karnitschnig & van Daalen, *supra* note 12. "The number of tax treaties concluded by Luxembourg has increased (over 60 are expected in the near future) ..." Andre Pesch & Marc van Campen, *Structuring Private Equity Deals Through Luxembourg and The Netherlands Holding Companies or Funds*, BAKER & MCKENZIE, WESTLAW 3 (2010).

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Directive⁷⁰ allowing companies to pay taxes in a European headquarters country rather than where their other subsidiaries operated.⁷¹ Luxembourg also expanded a web of tax treaties⁷² In addition, in 1989, Luxembourg began to offer tax rulings,⁷³ although the process was informal (not codified).⁷⁴

The demand for such rulings was reportedly linked with Luxembourg's adoption of a French holding company structure, the Société de Participations Financières, or SOPARFI,⁷⁵ "to secure the benefits of international tax treaties. The new structures were stuffed with 'hybrid' debt, considered to be debt in Luxembourg but equity elsewhere."⁷⁶ These strategies can achieve "double nontaxation" (taxation nowhere), which, in this context, typically entails treating a financial instrument as debt in a country where it produces deductible interest but as equity in a country where dividends received are not taxed.⁷⁷ "Rulings were

70. See EUR. UNION, *Types of Legislation*, https://europa.eu/european-union/law/legal-acts_en [<https://perma.cc/CRV6-R8T7>] (last visited Jan. 18, 2024) ("A 'directive' is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals.").

71. This must refer to the Parent-Subsidiary Directive, Council Directive 90/435/EEC of 23 July 1990, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31990L0435&from=EN> [<https://perma.cc/UMM5-3MGZ>]. "The Parent-Subsidiary Directive eliminates withholding taxes on inter-corporate dividends from a subsidiary." Charles M. Harris, Jr., *The European Community's Parent-Subsidiary Directive*, 9 FLA. J. INT'L LAW 111, 113 (1994). The other E.U. Directive adopted in 1990 was on mergers. *Id.* at 112 & n.1.

72. Karnitschnig & van Daalen, *supra* note 12.

73. See *infra* note 80 and accompanying text.

74. See *infra* text accompanying notes 80-83.

75. See *Luxembourg vehicles: SOPARFI Holding and financing company scheme*, DELOITTE, <https://www2.deloitte.com/lu/en/pages/tax/articles/luxembourg-vehicles-soparfi.html> [<https://perma.cc/6BN4-CPFF>] (last visited Jan. 18, 2024). A SOPARFI "offers a 'participation exemption' that eliminates domestic entity-level tax on dividends and capital gains received from its subsidiary if the SOPARFI holds 10% or more ownership in the subsidiary. It also provides flexible, thin capitalization rules and hybrid instruments." Young Ran (Christine) Kim, *Engineering Pass-Throughs in International Tax: The Case of Private Equity Funds*, 56 SAN DIEGO. L. REV. 707, 745-46 (2019) (footnotes omitted). The SOPARFI "is the most common vehicle dedicated to holding and financing activities in Luxembourg." DELOITTE, *supra*.

76. Alex Barker & Vanessa Houlder, *How Juncker and Luxembourg Landed Silicon Valley's Biggest Catch*, FIN. TIMES (Dec. 11, 2014), <https://www.ft.com/content/78abd184-813c-11e4-896c-00144feabdc0> [<https://perma.cc/76R4-3QDS>] ("How the tax web was woven" sidebar). See also François Petit, *The Past, Present, And Future of Luxembourg Special Purpose Companies* (2015), http://publications.ruchelaw.com/news/2015-09/Vol2no8_02_Guest_Lux.pdf [<https://perma.cc/4E9T-Q5DT>] ("Concurrent with the rise of the S.O.P.A.R.F.I., a new practice was developed in Luxembourg: the granting of tax rulings . . .").

77. See Marian, *supra* note 2, at 49; OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report* 11 (2015), <https://www.oecd.org/tax/neutralising-the-effects-of-hybrid-mismatch-arrangements-action-2-2015-final-report-97892>

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needed to give companies the confidence the [new structures were] acceptable to tax inspectors.”⁷⁸

In 1989, Luxembourg’s tax administration, the Administration des Contributions Directes (ACD), issued two administrative Circulars providing the tax treatment in specific situations.⁷⁹ Later the same year, the ACD issued a short internal memorandum describing a tax-rulings system.⁸⁰ The memorandum states, in part, “[t]he administration’s offices may provide advice that binds the administration on the tax incidence of precisely defined factual situations, if there is a specific reason supported by considerable tax consequences.”⁸¹ The memorandum goes on to state that the request must be in writing, and it also lists seven items that the request must contain.⁸² In addition to being an informal administrative procedure, this ruling process was free of charge and confidential.⁸³

64241138-en.htm [https://perma.cc/G6G8-YE2K] (“Hybrid mismatch arrangements exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation, including long-term deferral.”).

78. Barker & Houlder, *supra* note 76 (“How the tax web was woven” sidebar).
79. FATIMA CHAOUCHE, LEGITIMATE EXPECTATIONS IN LUXEMBOURG TAX LAW: THE CASE OF ADMINISTRATIVE CIRCULARS AND TAX RULINGS § 2.2.1 (2019) (“The 1989 internal memorandum was preceded by two administrative circulars published by the ACD in June and July of that same year.... These two circulars were ... the first formal introduction of the tax ruling procedure in Luxembourg.”).
80. Note de service L.G./N.S. n°3 du 21 août 1989 (unpublished), *Renseignements Fournis Par Les Fonctionnaires de L’administration Des Contributions Ayant Pour Effet de Lier L’administration (Bindende Auskünfte/Zusagen)* (internal memorandum dated August 21, 1989), <https://www.dei-lenk.lu/wp-content/uploads/2014/12/circulaire-administration-des-contributions.pdf> [https://perma.cc/Y8XE-2FH8]. See also Bernard Thomas, *Retour au bureau d’imposition Sociétés 6*, L’ÉTATZEBUERGER LAND (original in French) (June 30, 2017), <https://www.land.lu/page/article/120/333120/DEU/index.html> [https://perma.cc/NV3V-BCB4] (referring to “une pratique administrative qui avait été introduite en août 1989 par une note de service (quelques pages tapées à la machine à écrire)” meaning “an administrative practice that had been introduced in August 1989 by a memorandum (a few typed pages)”).
81. Note de service, *supra* note 80, at 1 (“Les services de l’administration peuvent fournir des renseignements qui lient l’administration sur l’incidence fiscale de situations de fait circonscrites avec précision, s’il existe un intérêt particulier documenté par des répercussions fiscales considérables.”) All translations from French are by the author, unless otherwise noted; “intérêt particulier” is susceptible of various translations, such as a specific financial interest.
82. *Id.* at 1-2.
83. Wayne L. Nesbitt, Edmund Outslay & Anh V. Persson, *A Reexamination of Investors’ Reaction to Tax Shelter News: Evidence from the Luxembourg Tax Leaks*, 75 J. ACCT. & ECON. 1, 5 (2022); see also Karnitschnig & van Daalen, *supra* note 12.

B. The Supply of Luxembourg Tax Rulings

1. The Role of the Dutch

It is not clear who originated the idea for the 1989 internal “note” that served as the basis for ACD tax rulings:

When asked to give further context on the origin of the 1989 internal circular, during a 2015 meeting of the Commission des Finances et du Budget, the Ministry of Finance explained that the note was inspired by German law but that it was impossible to trace back which authority was at the origin of the idea of the note, whether it was a Ministry in particular, or the ACD *sua sponte*.⁸⁴

Nonetheless, it is clear that the Netherlands, which has issued numerous tax rulings, served as an important model for Luxembourg.⁸⁵ For example, a 1997 Luxembourg government report (in a page on tax rulings that was kept confidential for years⁸⁶) referred to the example of the Netherlands using tax rulings to increase its attractiveness to multinationals:

In a Europe in which tax competition reigns, the negative effect of offshoring is thus reinforced. In this connection, it is worth pointing to the Netherlands, a “rulings” pioneer, which recently introduced innovations for the financing of groups in order to improve the tax environment for investments and to compete with attractive regimes offered outside the Netherlands.⁸⁷

In fact, Dutch advisers reportedly brought to Luxembourg the systematized tax rulings practice of the Netherlands.⁸⁸ It is therefore helpful to first understand a bit about rulings history in the Netherlands. There, beginning after World War II, in an effort to attract foreign investment, the government offered advance tax agreements.⁸⁹ This approach was successful,

84. CHAOUCHE, *supra* note 79, at § 2.2.1. *See also id.* at § 2.1.1 (discussing the German origins of Luxembourg’s 1960’s tax rulings practice).

85. Barker & Houlder, *supra* note 76 (“The Grand Duchy [of Luxembourg] was inspired by the Netherlands, renowned as a holding company centre. As well as rulings, Luxembourg copied a significant Dutch capital gains tax exemption.”); *see also infra* note 88 and accompanying text.

86. *See infra* text accompanying notes 177-180.

87. The page (in French) is available at <https://s3.eu-central-1.amazonaws.com/euobs-media/495d0a51a0f6f76e9715d06031eff99d.pdf> [<https://perma.cc/DYN4-PK3T>] [herein-after Krecké Page].

88. Petit, *supra* note 76 (“At the beginning, the granting of Rulings was an administrative practice. Its proliferation in Luxembourg can be traced to the migration of Dutch tax advisors in the early 1990’s and to the cooperation of the Luxembourg tax authorities, who established a tax office fully dedicated to S.O.P.A.R.F.I.’s and the granting of Rulings.”); Thomas, *supra* note 13 (“[C]e n’est qu’en 1989 que la pratique des rulings fut importée au Luxembourg via des fiduciaires néerlandaises” meaning “it was not until 1989 that rulings were imported into Luxembourg via Dutch fiduciaries”).

89. Jan Vleggeert & Henk Vording, *How The Netherlands Became a Tax Haven for Multinationals* 399, in 9 STUDIES IN THE HISTORY OF TAX LAW (Peter Harris & Dominic de
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and the Netherlands subsequently became known as a “conduit’ country for capital flows of multinationals wishing to avoid taxation.”⁹⁰ Its tax-rulings system, combined with its numerous tax treaties and the absence of certain withholding taxes, were key elements in its attractiveness.⁹¹

Moreover, although some countries adopted domestic legislation to combat the use of “letterbox companies”—shell companies with only a mailbox for a location⁹²—for tax-avoidance purposes,⁹³ the Netherlands had not forbidden their use. Indeed, “residents of third countries could gain access to Dutch tax treaties by establishing a Dutch letterbox company whose shares were held by an Antillean letterbox company.”⁹⁴

In the 1970s, the Netherlands began to have tax inspectors,⁹⁵ rather than the Ministry of Finance, provide rulings. Tax advisors responded by “inspector shopping”—submitting a matter to multiple inspectors to find the most

Cogan Eds., 2019) (also stating “There was no transparency as to what the agreements entailed.”). Vleggeert and Vording provide timing information on three types of rulings. *See id.* at 402 (“Informal capital rulings have been an important attraction of the Dutch ruling climate since the 1950s.”); *id.* at 404 (“Letterbox company rulings were already in use at around 1970.”); *id.* at 401-06 (“The application of the participation exemption to low-tax group financing companies ... was probably developed before the 1970s as well.”).

90. MICHEL VAN DIJK, FRANCIS WEYZIG & RICHARD MURPHY, *THE NETHERLANDS: A TAX HAVEN?* 15 (2006), <http://bibalex.org/baifa/Attachment/Documents/129156.pdf> [<https://perma.cc/5XKT-XH4W>]. Van Dijk et al. point out the significant benefits that the Netherlands gained, including tax revenues. *Id.* at 30 (“In 2001, the most recent information available, the total direct revenue for the Dutch state as a consequence of SFIs [Special Financial Institutions— foreign companies that route financial flows through the Netherlands at least partly for tax reasons] activity was €1.7 billion, approximately 70% of which (€1.2 billion) from taxation.”) They also point out several risks of the Netherlands’ approach, including that “tax havens provide a secure cover for laundering the proceeds of all kinds of illegal activities.” *Id.* at 31.

91. Vleggeert & Vording, *supra* note 89, at 392.

92. Pesch & van Campen, *supra* note 69, at 5 (describing a letterbox company as “empty holding company[y] managed by [a] trust compan[y] [with] no real address except for a letterbox at the trust company’s address.”).

93. *Id.* (“[S]ome European countries such as Austria and Germany have introduced rigorous tax avoidance legislation under which local tax authorities can deny an SPV [Special Purpose Vehicle] the benefits of a given tax convention or EU directive..”). “These SPVs are generally empty holding companies managed by trust companies and have no real address except for a letterbox” *Id.*

94. Vleggeert & Vording, *supra* note 89, at 399.

95. *Id.* “‘The inspector’ (de inspecteur) is a legal term used in the tax laws. It is ‘the inspector’ who makes tax assessments, enters into correspondence with taxpayers, grants time extensions in filing tax returns, deals with appeal procedures and so on.” P.A.C. Burgman, *Corporation Tax in the Netherlands: The Institution of the Advance Ruling*, 16 *INTERTAX* 297, 301 (1988).

favorable result.⁹⁶ The Dutch tax administration did not like this practice.⁹⁷ It therefore attempted to develop more of a cookie-cutter approach, to standardize results across tax inspectors.⁹⁸ Over time, the tax administration developed some “standard rulings.”⁹⁹ In 1986, the Netherlands began to further tighten its rulings practice, restricting deviation from the standard rulings, after its Court of Auditors released a report criticizing the country’s tax-rulings practices.¹⁰⁰

In a 1990 resolution, the Netherlands centralized its tax-rulings team in Rotterdam,¹⁰¹ in order to restrict inspector shopping.¹⁰² It also adopted a reporting requirement.¹⁰³ “Under this reporting requirement, the ruling team had to send the Ministry of Finance for discussion rulings which, despite the strict policy, deviated from the standard rulings. Instead of certainty, this created uncertainty.”¹⁰⁴

Although the Netherlands issued numerous rulings consistent with its “standard rulings” templates in the early 1990s,¹⁰⁵ it issued few “deviating” rulings from 1989 to 1992, reflecting a tightened rulings practice.¹⁰⁶ During

96. ROMANO, *supra* note 15, at 25-26 (“Moreover, once the opinion of a tax inspector on certain issues was known to tax consultants, there was also the possibility to choose the ‘most benevolent’ tax inspector for asking the ruling.”). In 1978, the Netherlands began holding meetings for tax inspectors, to increase rulings uniformity. Samantha van den Hoek, *De Nederlandse rullingpraktijk en de Europese aanpak van staatssteun* 5 (2018), <https://scripties.uba.uva.nl/scriptie/656084> [<https://perma.cc/ALE7-8JR5>] (“Periodic national ruling meetings for the inspectors were started in 1978 in order to achieve more national coordination.”) (original in Dutch).

97. Vleggeert & Vording, *supra* note 89, at 400 (quoting Kamerstukken II 1986/87, 19700 IX B, nr. 71, 3).

98. Jan W. Savelbergh, *International Developments in Taxation in The Netherlands*, 11 INT’L BUS. LAW 89, 90 (1983). This 1983 article further observed that “there is still scope for discussion and negotiating with the tax inspectors on tailored rulings.” *Id.*

99. Arnaud Booij, *Netherlands Relaxes Rulings Policy*, 6 INT’L TAX REV. 45, 45 (1995).

100. Vleggeert & Vording, *supra* note 89, at 400.

101. ROMANO, *supra* note 15, at 35 (citing item 6 of Resolution No. CA90/3 of 26 April, 1990).

102. *Id.* at 36.

103. *Id.*

104. *Id.* The ruling team entailed “centralization of the rulings activities in the Tax Office for Large Enterprises in Rotterdam (*Belastingdienst Grote Ondernemingen*...)...” *Id.* at 26.

105. *See id.* at 34 (showing a table with a total of over 2,900 standard rulings issued between May 1, 1988 and June 30, 1992). Subsequently, the Netherlands relaxed its rulings policy again: “From the mid-1990s on, a liberal policy was pursued...” *Id.*

106. *See* Jason Chang et al., *Tax Policy Forum: Private Income Tax Rulings—A Comparative Study*, 10 TAX NOTES INT’L 713, 747 (1995) (“In the period 1989-91, only three deviating rulings were issued. In the period 1991-92, only one deviating ruling was issued.”). Romano questions this, saying, “the letter to the secretary for finance of 20 February
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that period, some Dutch tax practitioners relocated to Luxembourg.¹⁰⁷ The Dutch firm of tax advisers Loyens & Volkmaars opened a Luxembourg office in 1991.¹⁰⁸ Thus, Dutch tax advisers, facing a tightening rulings system at home, apparently approached the Luxembourg tax administration looking for the possibility of obtaining similar rulings in Luxembourg for their clients. According to the *Lëtzebuenger Land* newspaper, “[t]he first people to fill the offices of [Luxembourg tax office] bureau chief Marius Kohl were therefore the Dutch.”¹⁰⁹

2. The Role of the Big Four

While the Dutch reportedly played an important role in the origins of Luxembourg’s systematized rulings practice, the Big Four firms helped it grow. In the initial ICIJ database revealed in LuxLeaks, PwC had over 500 documents.¹¹⁰ Nor was PwC alone.

Shortly after publication [of the initial LuxLeaks stories], ICIJ received a semi-cryptic message through the tip form on its website The new leak contained agreements from a number of American corporations including the Walt Disney Company and Koch Industries. The leak also showed how other U.S. accounting firms, including Ernst & Young, Deloitte, and KPMG were involved in the same activity as PricewaterhouseCoopers.¹¹¹

Although it appears that all of the Big Four accounting firms had obtained Luxembourg tax rulings for clients, PwC has a particularly strong presence in Luxembourg. PwC “is the largest professional services firm in the

1992 quoted several exceptions to the standard rulings,” and refers to seven rulings fitting within these exceptions. ROMANO, *supra* note 15, at 34-35 n.78.

107. See Bernard Thomas, *Thérapie de choc*, LËTZEBUERGER LAND (May 1, 2015), <http://www.land.lu/page/article/177/8177/DEU/index.html> [<https://perma.cc/5FG3-H4WE>] (“This policy triggered the exodus of Dutch optimizers.”) (original in French). Cf. Barker & Houlder, *supra* note 76 (“Revisions to Dutch tax treaties . . . prompted some advisers to decamp to the Grand Duchy.”).

108. *Celebrating 30 Years of Passion, Evolution and Expertise in Luxembourg* (Mar. 22, 2021), LOYENS & LOEFF, <https://www.loyensloeff.com/insights/news--events/news/celebrating-30-years-of-passion-evolution-and-expertise-in-luxembourg/> [<https://perma.cc/4QDT-DRZU>]. Loyens & Volkmaars changed its name to Loyens & Loeff in 2008. *Luxembourg*, LOYENS & LOEFF (“Our history” section), <https://www.loyensloeff.com/contact/luxembourg/> [<https://perma.cc/TC97-5GG6>] (last visited Jan. 18, 2024).

109. Thomas, *supra* note 107 (original in French). The role of Marius Kohl is discussed further below. See *infra* Part I.B.3.

110. Marian, *supra* note 2, at 8 (“The first [leaked batch of rulings], which included 548 documents issued to 340 MNCs, was made public in November 2014. This batch was leaked by Antoine Deltour, a former employee at PwC’s Luxembourg office. Naturally, the documents leaked by Deltour contained mostly documents drafted or submitted by PwC.”).

111. BERNSTEIN, *supra* note 1, at 214.

country,”¹¹² with over 3,000 employees in Luxembourg as of 2020.¹¹³ When PwC opened its new Luxembourg office on November 24, 2014—less than three weeks after LuxLeaks—the attendee list appears to have been something of a “who’s who” of Luxembourg. It reportedly included, among others, “Prime Minister Xavier Bettel..., the Minister of Finance Pierre Gramegna... the Minister of Sustainable Development and Infrastructure François Bausch...[,] one or another ex-minister (Lucien Lux and Jeannot Krecké), [and] the mayor of the City of Luxembourg, Lydie Polfer.”¹¹⁴

PwC and other firms requested tax rulings for clients, but it was Luxembourg’s tax administration, the ACD, that issued those rulings. As noted above, most of Luxembourg’s tax rulings were issued by one of the ACD’s tax offices, Sociétés 6,¹¹⁵ the office responsible for financial and holding companies.¹¹⁶ A measure of the importance of that office is that most

112. *People*, PwC LUXEMBOURG, <https://www.pwc.lu/en/annual-review/pwc-luxembourg-annual-review-2020/people.html> [<https://perma.cc/HAL7-NCRW>] (last visited Jan. 18, 2024).

113. *Id.* To put the 3,000 employees in context, in the first quarter of 2020, Luxembourg’s “Domestic payroll employment by activity—seasonally adjusted data” was 442,530 employees, with 49,716 of those devoted to “[f]inancial and insurance activities.” *Domestic payroll employment by activity - seasonally adjusted data*, STATISTIQUES.LU, [https://lstat.statec.lu/vis?lc=en&fs\[0\]=Topics%2C1%7CPopulation%20and%20employment%23B%23%7CLabour%20market%23B5%23&fs\[1\]=Topics%2C0%7CPopulation%20and%20employment%23B%23&pg=0&fc=Topics&df\[ds\]=ds-release&df\[id\]=DF_B3003&df\[ag\]=LU1&df\[vs\]=1.0&pd=2015-Q1%2C2023-Q2&dq=Q.&ly\[rw\]=TIME_PERIOD&ly\[cl\]=BRANCH](https://lstat.statec.lu/vis?lc=en&fs[0]=Topics%2C1%7CPopulation%20and%20employment%23B%23%7CLabour%20market%23B5%23&fs[1]=Topics%2C0%7CPopulation%20and%20employment%23B%23&pg=0&fc=Topics&df[ds]=ds-release&df[id]=DF_B3003&df[ag]=LU1&df[vs]=1.0&pd=2015-Q1%2C2023-Q2&dq=Q.&ly[rw]=TIME_PERIOD&ly[cl]=BRANCH) [<https://perma.cc/DRY7-RG8R>] (last visited Jan. 18, 2024).

114. Bernard Thomas, *Les associés*, LËTZEBUERGER LAND (Dec. 5, 2014), <http://www.land.lu/page/article/810/7810/FRE/index.html> [<https://perma.cc/882Z-SQ5W>] (original in French).

115. *See supra* text accompanying note 44. “Société” means “company” or “firm” in English. *See Translation of “société”—French-English dictionary*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/french-english/societe> [<https://perma.cc/7TFK-PXH5>] (last visited Jan. 18, 2024). Sociétés 6 is just one of several Luxembourg tax offices. The ACD has two main divisions, one of which is the tax department. The ACD’s website lists “Taxation Departments” and “Revenue Department.” *See Luxembourg Inland Revenue (ACD)*, GUICHET.LU, https://guichet.public.lu/en/citoyens/organismes/organismes_entreprises/administration-contributions-directes.html [<https://perma.cc/R3DV-HFFF>] (last visited Jan. 18, 2024). The tax department has multiple sections, each of which has various offices. *Id.* (listing the Business Section, Section on Natural Persons, Section for Withholding Tax on Wages and Salaries, and Section on Real Estate Valuations). Its Business Section has eight tax offices, with each office having jurisdiction over a particular industry sector or geographic region. OECD, 2017, *supra* note 48, at 190; ACD, *Service d’imposition – Section des sociétés*, https://impotsdirects.public.lu/fr/profil/organigramme/impo_soc.html [<https://perma.cc/88PN-VF5Z>] (last visited Jan. 22, 2024) (providing a link for each Sociétés office to a page that includes a description in French of its jurisdiction). Sociétés 6 is located in the Business Section. *See id.* (listing Sociétés 1 through 6 and two other offices).

116. *See* ACD, *Sociétés 6*, https://impotsdirects.public.lu/fr/profil/organigramme/impo_soc/societes6.html [<https://perma.cc/9QGS-W4YQ>] (last visited Jan. 18, 2024) (listing in

footnote continued on next page

of the foreign companies in Luxembourg are holding companies.¹¹⁷ Sociétés 6 was not always large, but it grew starting in 1990¹¹⁸ after the E.U. eliminated withholding tax “on cross-border dividend flows between related companies.”¹¹⁹ As of 2014, the year of LuxLeaks, Sociétés 6 oversaw approximately 50,000 companies.¹²⁰

3. Amenability: “Monsieur Ruling”

The steady supply of tax rulings required a willingness on the part of the tax administration to grant those rulings. And Sociétés 6 reportedly was amenable to doing so. Marius Kohl was the head of Sociétés 6 for twenty-two years until he retired in 2013.¹²¹ He is a mysterious figure who seems to have avoided media appearances.¹²² The *Wall Street Journal* described him in 2014 only as “a bearded 61-year-old with a ponytail.”¹²³ Kohl had a staff of about 50, but he had unilateral authority to approve Sociétés 6 ruling requests.¹²⁴ Professor Omri Marian found that, in his sample of 172 rulings revealed by LuxLeaks, Marius Kohl had signed all of them.¹²⁵ Édouard Perrin’s show on

French areas of responsibility for Sociétés 6 that include “resident and non-resident financial companies: credit institutions, financial sector professionals, financial investment companies [SOPARFI’s], [and] securitization companies”). A SOPARFI is a type of holding company. See *supra* note 75 and accompanying text.

117. Caroline De Gruyter, *Luxembourg, Europe’s Bellwether*, CARNEGIE EUR. (Jan. 26, 2016), <https://carnegieeurope.eu/2016/01/26/luxembourg-europe-s-bellwether-pub-62578> [<https://perma.cc/7TEL-MK3X>] (“The duchy houses around 50,000 foreign firms, mostly holding companies.”).
118. *Id.* (“Puis, à partir de 1990, suite à la transposition de la directive mères-filiales, la croissance du nombre de dossiers a été fulgurante.”).
119. Miranda Stewart, *Commentary*, 54 TAX L. REV. 111, 113 (2000).
120. Chenoweth, *supra* note 28.
121. See Karnitschnig & van Daalen, *supra* note 12 (referring to “Mr. Kohl’s 22-year tenure”). This indicates that he became the head of Sociétés 6 in approximately 1991. He spent a total of “37 years at the tax office.” *Id.*
122. Kohl did not appear in court during the LuxLeaks trial, “citing ill health.” Simon Marks & Bjarke Smith-Meyer, *Former tax chief misses LuxLeaks trial (again)*, POLITICO (Dec. 15, 2016). He reportedly was not at work when the French TV show *Cash Investigation* knocked on his office door. See *infra* note 258.
123. Karnitschnig & van Daalen, *supra* note 12.
124. *Id.* See also *Projet De Loi N°6722, Chambre des Députés Session ordinaire 2014-2015, Avis du Conseil D’Etat* 15 (Nov. 18, 2014), <https://www.chd.lu/en/dossier/6722> [<https://perma.cc/33NF-3KPF>] (linking document <https://wdocs-pub.chd.lu/docs/exped/189/340/138389.pdf> [<https://perma.cc/45M5-83BF>]) (“The State Council points out that the head of each tax office is autonomous in their decisions”) (original in French).
125. Marian, *supra* note 2, at 1 (“One hundred and seventy-two of the documents are hand-coded and analyzed.”); *id.* at 17 (“all ATA submissions in the sample were addressed to the attention of Kohl, and all ATA approvals were granted by Kohl.”).

French television, *Cash Investigation*, similarly reported that Kohl had signed all of the rulings it obtained.¹²⁶ The *Wall Street Journal* described Kohl as always careful to follow the law, “but if he could take the business-friendly reading, he would.”¹²⁷ It also reported that Kohl was nicknamed “Monsieur Ruling.”¹²⁸

The authors of the *Wall Street Journal* article spoke with Mr. Kohl, reportedly Kohl’s first and last interview.¹²⁹ It is interesting to note that Kohl gave an interview to a major newspaper shortly before LuxLeaks. The date of the interview is not stated in the article, but the article was published on October 21, 2014, a little over two weeks before the November 5, 2014 LuxLeaks revelations.¹³⁰ Mr. Kohl probably knew that journalists were working on stories about Luxembourg tax rulings. Reportedly, “[t]he ICIJ investigation had leaked out as partners approached the companies involved for comment. Several of ICIJ’s collaborators tried to speak with ‘Monsieur Ruling’ himself, Marius Kohl, but he turned down all their requests.”¹³¹

In its article, the *Wall Street Journal* reported that Kohl stated that “none of his superiors in the finance ministry, including Jean-Claude Juncker, who served as finance minister for two decades, questioned or criticized his approach at Sociétés 6.”¹³² A reporter for the Luxembourg newspaper *d’Lëtzebuurger Land* commented on the *Wall Street Journal* quote, stating that Kohl “had tried to protect his rear, noting that Jean-Claude Juncker had ‘never complained’ about his work.”¹³³

Under Kohl, Luxembourg’s tax rulings process reportedly was very streamlined. Kohl apparently approved many of them the same day they were

126. *Paradis Fiscaux*, *supra* note 32, at 14:00-14:16 (“[N]os documents ... sont des accords fiscaux ... toujours validés officiellement au même endroit, un tampon, une signature, c’est à chaque fois la même personne qui signe—le préposé du bureau numéro six, un dénommé Marius Kohl ...” meaning “our documents ... are tax agreements, always approved in the same place, a stamp, a signature; it’s the same person who signs every time—the head of office number 6, one Marius Kohl.”) (narration transcribed and translated by the author).

127. Karnitschnig & van Daalen, *supra* note 12 (quoting Alain Steichen). The title of the *Wall Street Journal* article is “Business-Friendly Bureaucrat Helped Build Tax Haven.” *Id.*

128. *Id.*

129. *Id.* (“I could say ‘yes’ or ‘no,’” Mr. Kohl, a bearded 61-year-old with a ponytail, said in a recent interview, which he described as his first.”); Thomas, *supra* note 80 (referring to “his first and last interview, appearing in the *Wall Street Journal*”) (original in French).

130. *See supra* note 1 (date of LuxLeaks); *supra* note 12 (date of *Wall Street Journal* article).

131. BERNSTEIN, *supra* note 1, at 213.

132. Karnitschnig & van Daalen, *supra* note 12.

133. Thomas, *supra* note 80 (“l’ancien préposé avait pourtant tenté d’assurer ses arrières, soulignant que Jean-Claude Juncker ne s’était ‘jamais plaint’ de son travail.”).

submitted.¹³⁴ *Tax Notes International* reported that, at the LuxLeaks trial, whistleblower Raphaël Halet testified that “30 to 40 tax ruling requests would be prepared every Wednesday, put on a memory stick, and delivered to Kohl for approval by 5 p.m. that evening. Most of the rulings were returned on the day they were sent out”¹³⁵ That claim is rather astonishing.¹³⁶ Interestingly, an examination of the rulings data collected by Omri Marian shows that for 126 out of 172 of them, or 73.26%, the request date falls on a Wednesday, which is much higher than what one would expect if ruling requests were randomly distributed over weekdays.¹³⁷ The data also contain multiple dates on which several ruling requests fall.

Although Mr. Kohl apparently issued rulings quickly, it is not because they were short or simple documents. Luxembourg tax rulings were lengthy.¹³⁸ They varied in the number of and specific issues covered, but the 172 rulings in the ICIJ database that Omri Marian examined typically contained multiple

134. BERNSTEIN, *supra* note 1, at 198 (“Marius Kohl had approved about 40 percent of the submitted tax agreements . . . on the very day they were submitted.”); *see also* Marian, *supra* note 2, at 17 (“about 40% of the ATAs [he reviewed] were approved the same day they were submitted.”).

135. Teri Sprackland, *PwC-Luxembourg Tax Office Ties Highlighted at Trial*, 82 TAX NOTES INT’L 528, 528 (2016) (emphasis added).

136. One article about the trial notes that “We may never know whether Halet’s testimony is accurate, because the tax official who testified shortly afterward refused to answer any questions about how his office worked, claiming the information was privileged and confidential.” Stuart Gibson, *Luxembourg Is Prosecuting the Wrong People in the LuxLeaks Trial*, FORBES (May 5, 2016), <https://www.forbes.com/sites/taxanalysts/2016/05/05/luxembourg-is-prosecuting-the-wrong-people-in-the-luxleaks-trial/?sh=47c774837a67> [<https://perma.cc/4DS2-HZN5>].

137. Day check and percentage calculation performed by the author using Professor Omri Marian’s data. The author thanks him for the access to his data.

Halet also reportedly testified that Kohl met with PwC advisers monthly on a Wednesday. Halet reportedly testified, “between 2011 and 2015, one Wednesday a month PwC tax partners met [with] Marius Kohl . . . Halet said his team prepared the papers for the partners to take to the Wednesday meetings. Partners returned the files by the end of the day.” Staff, “3 minutes per document”, DELANO (May 2, 2016), https://delano.lu/article/content_3-minutes-document [<https://perma.cc/L4CE-UAGN>].

Omri Marian’s data contains ruling requests dated 2003 to 2010. In 2010, there are ruling requests that fall on more than one Wednesday within a month (March 10 and March 24, 2010).

138. *See* BERNSTEIN, *supra* note 1, at 198 (“[T]he submitted tax agreements . . . averaged between twenty and one hundred pages in length”); One study of LuxLeaks rulings examined “about 6,000 pages” relating to 123 firms. Inga Hardeck & Patrick U. Wittenstein, *Assessing the Tax Benefits of Hybrid Arrangements—Evidence from the Luxembourg Leaks*, 71 NAT’L TAX J. 295, 297-98 (2018).

issues.¹³⁹ A 2009 ruling Luxembourg issued to ABRY Partners, a U.S.-based private equity firm that Marian drew on as an example¹⁴⁰ is 21 pages long¹⁴¹ and requests a ruling on seven main issues.¹⁴² Some of the submissions were much longer, even “hundreds of pages long.”¹⁴³

In a press release after LuxLeaks, Luxembourg’s Minister of Finance explained the rulings process.¹⁴⁴ Perhaps addressing reports about its speed,¹⁴⁵ he stated that the process generally included a meeting to explain the transaction prior to filing the ruling request:

Because of its complexity, the ruling practice regarding the tax treatment of international corporate business usually requires by its essence and for the sake of clarification prefilling [sic] meetings where the taxpayer has the possibility to explain in a more detailed manner the planned transaction, before submitting a more formal written ruling request [A] company will have to submit a detailed case file, which will be thoroughly reviewed by the tax administration¹⁴⁶

Thus, Kohl appears to have developed a streamlined process for taxpayers to obtain a tax ruling from Sociétés 6. The *Wall Street Journal* further described the set-up of the meetings as involving routine conferences in Mr. Kohl’s office.¹⁴⁷

139. Professor Marian reported on the frequency in which 13 specific issues appeared in his data. See Marian, *supra* note 2, at 27 fig. 5. For example, that article shows that Luxembourg residence (a threshold determination) was an issue in 60 percent of the rulings in his data; margin determination was an issue in about 50 percent; and thin capitalization and debt classification were each in about 46 percent of the rulings. *Id.* The fact that several issues were present in approximately half of the rulings shows that rulings were not limited to one issue each. In addition, Professor Marian’s data, shared with the author, reflects a range in the number of issues per ruling.

140. See Marian, *supra* note 2, at App. B.

141. See Luxembourg Leaks Database, <https://www.documentcloud.org/documents/1345263-abry-partners-2009-tax-ruling.html> [<https://perma.cc/29QC-2XYV>] (last visited Feb. 23, 2024).

142. *Id.* at 3-5.

143. Marian, *supra* note 2, at 17-18; see also *supra* note 138.

144. Luxembourg Ministry of Finance Position Paper on the Luxembourg’s Government Position on the Practice of Issuing Tax Rulings 1 (Dec. 10, 2014), <https://europaforum.public.lu/fr/actualites/2014/12/gouv-ruling-luxleaks-prises-positions/position-paper-transparency-and-rulings.pdf> [<https://perma.cc/NS85-N3S5>] [hereinafter Press Release].

145. See *supra* note 134 and accompanying text.

146. Press Release, *supra* note 144, at 1.

147. That may not always have been the case. The Luxembourg country questionnaire included in the 1999 Simmons & Simmons report did not describe such meetings as a standard part of the process: “Although in some cases, oral explanations are given to the tax office involved in obtaining a ruling, the general practice is that the authority responds to a request by confirming their agreement in writing together with the opinion submitted to them.” Simmons & Simmons, *Administrative Practices in Taxation Annex, Luxembourg Questionnaire 7* (1999) [hereinafter Simmons & Simmons Annex].

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Mr. Kohl usually hosted company representatives and their tax advisers in his large corner office at Sociétés 6 Seated at the center of a conference table, Mr. Kohl would often go over several company dossiers with tax advisers in one sitting. “We would meet him once a month, and if [a tax structure] was OK, you could basically do the deal right away,” says Marc Schmitz, head of taxation at the Luxembourg branch of Ernst & Young.¹⁴⁸

Companies could also “make adjustments if the tax office ha[d] a problem with the structure.”¹⁴⁹

PwC’s tax advisers appeared to have worked closely with Mr. Kohl. *Tax Notes International* reported that, at the LuxLeaks trial, whistleblower Raphaël Halet gave the rather astonishing testimony that “[f]or Kohl’s convenience, PwC staff were instructed to keep government letterhead on hand for printing final versions, . . . adding that he was sure of the process because PwC clients would frequently call to verify that their rulings were safely in hand.”¹⁵⁰

Omri Marian also found in the rulings he reviewed that “the written legal analysis” was provided by the tax adviser requesting the ruling—not the ACD—“followed by Kohl’s acceptance of such analysis verbatim.”¹⁵¹ That is consistent with a 1999 report known as the Simmons & Simmons report—not made public until 2015—which stated, “[i]n most cases . . . rulings are given by returning to the applicant a copy of their letter with confirmation of the views expressed in the application together with appropriate reservations if any.”¹⁵² Professor Marian further found in the rulings he reviewed that “Kohl’s approval decisions come in a cookie-cutter format”¹⁵³ of a single paragraph.¹⁵⁴

Luxembourg also reportedly did not investigate the facts represented by the taxpayer. For example, the Simmons & Simmons report included the following in Luxembourg’s response to its questionnaire:

In practice, there is no pre-ruling procedure involving meetings, site visits, audit or investigation by correspondence. The nature of the rulings is that they are binding on the administration only to the extent the facts therein are correct and complete. Where it transpires that the submissions of the taxpayer are incorrect or incomplete, . . . the tax administration will be free to disregard its own ruling. This will normally render prior investigation unnecessary.¹⁵⁵

148. Karnitschnig & van Daalen, *supra* note 12. Statistics show that the ACD rejected a few rulings before 2015. See *infra* text accompanying note 301 (E.U. APA data shows that Luxembourg rejected none in 2012 and 2013, and 10 in 2014).

149. Karnitschnig & van Daalen, *supra* note 12.

150. Sprackland, *supra* note 135 (emphasis added).

151. Marian, *supra* note 2, at 18.

152. Simmons & Simmons Annex, *supra* note 147, Luxembourg Questionnaire at 7.

153. Marian, *supra* note 2, at 18.

154. *Id.* Cf. *supra* note 126 (referring to the consistency of the validation stamp and signature).

155. Simmons & Simmons Annex, *supra* note 147, Luxembourg questionnaire at 8.

Omri Marian did find in his study that some of the submissions lacked complete information. For example, “[o]nly about half of the rulings seeking instrument tax classification contained full documentation.... About 40 percent contained some description of the instrument but not the instrument itself, and about 10 percent contained little or no description of the instrument.”¹⁵⁶

Some of the documents revealed by LuxLeaks were APAs, which involve transfer pricing.¹⁵⁷ Transfer pricing is intracompany pricing; it allocates the tax base across multiple countries.¹⁵⁸ Typically, such calculations are done using an “arm’s-length” standard,¹⁵⁹ meaning “that prices are not artificially manipulated when they resemble prices which are set as if companies were independent of each other, i.e. at arm’s length.”¹⁶⁰ Even then, however, there generally is a range of possible prices.¹⁶¹ APAs reflect taxpayer and government agreement on the intracompany price.¹⁶²

It was not until 2015 that Luxembourg included the arm’s-length standard in its statutes.¹⁶³ Thus, as with the tax-rulings procedure, the transfer-pricing standards were informal during the time that Marius Kohl presided over Sociétés 6. In October 2014, the *Wall Street Journal* reported:

156. Marian, *supra* note 29, at 288.

157. Christians, *supra* note 17, at 1124 (“Some of the LuxLeaks and state aid deals involve advance pricing agreements....”).

158. Adam H. Rosenzweig, *An Antigua Gambling Method for the International Tax Regime*, 44 WASH. U. J. L. & POL’Y 79, 84 (2014) (“Transfer pricing is the primary means by which taxpayers and governments divide tax base between multiple countries in which a multinational taxpayer does business.”). For a more detailed explanation of transfer pricing, see Lederman, *supra* note 39, at 226-28.

159. See OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* 33 (2017), https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page36 [<https://perma.cc/FDK2-W4M8>] (“the arm’s length principle ... is the international transfer pricing standard that OECD member countries have agreed should be used by MNE groups and tax administrations.”).

160. Phedon Nicolaides, *State Aid Rules and Tax Rulings*, 2016 EUR. STATE AID L.Q. 416, 416 (2016).

161. See Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT’L L. 353, 360 (2020) (“[T]he arm’s-length standard is said to produce a ‘range’ of correct answers, such that the choice of a point within that range is arbitrary.”).

162. Susan C. Borkowski, *Advance Pricing (Dis)Agreements: Differences in Tax Authority and Transnational Corporation Opinions*, 22 INT’L TAX J. 23, 24 (1996) (“[APAs] are pre-transaction agreements about acceptable transfer pricing methods for a given time period.”).

163. PwC, *Luxembourg Government Proposes to Formalize Transfer Pricing Legislation* (Oct. 21, 2016), <https://www.pwc.com/gx/en/tax/newsletters/pricing-knowledge-network/asset/s/pwc-TP-Luxembourg%20TP%20legislation.pdf> [<https://perma.cc/8HEP-6VFS>].

During Mr. Kohl's time as chief of Sociétés 6, the arm's-length test—an OECD rule—wasn't anchored in Luxembourg's tax law. Nor were companies required to provide detailed documentation to support their calculations.

Asked how he determined whether a company's pricing information was accurate, Mr. Kohl licked his thumb and held it up in the air.

"There was no way to verify it," he said.¹⁶⁴

In short, during this era, Luxembourg's tax administration, or at least one of its tax offices, apparently was highly amenable to offering rulings in a quick and informal process. The result was a streamlined structure that allegedly involved a tax administrator, Marius Kohl, working closely with tax advisers from firms such as PwC, to quickly offer a high volume of favorable tax rulings to multinational companies.

II. How the Rulings Program Flourished

A. Trust in the Tax Administration

1. Informal Rulings

As discussed above, Luxembourg's pre-2015 authority to offer tax rulings rested on a mere internal memorandum, rather than a statute or other formal process. Why then did some tax advisers from major firms such as the Big 4 seek those rulings? As discussed above, Marius Kohl, the head of Sociétés 6, who signed many Luxembourg tax rulings, had apparently developed a systematized approach. That process was quick and efficient. The *Lëtzebuurger Land* reported that "[w]ith a little luck, we could put through 'a good fifteen rulings in two hours,' recalls a business lawyer."¹⁶⁵ The *Land* also reported that Mr. Kohl could accept a ruling preliminarily.¹⁶⁶

Tax advisers seem to have trusted Mr. Kohl. He reportedly was known for not changing his mind.¹⁶⁷ The importance of Marius Kohl to Luxembourg's tax-rulings process is reflected in the timing of when the heyday of that process was. LuxLeaks whistleblower Raphaël Halet reportedly said in an interview that Kohl's plan to retire caused concern at PwC:

164. Karnitschnig & van Daalen, *supra* note 12. Luxembourg's 2015 legislation also codified the arm's length principle for transfer pricing. *See infra* note 247.

165. Thomas, *supra* note 13 (original in French).

166. Karnitschnig & van Daalen, *supra* note 12 ("During Mr. Kohl's 22-year tenure, ... in many cases, companies could get an informal nod from him before their application went under review.").

167. *Id.* ("Mr. Kohl earned a reputation for always honoring his preliminary rulings. 'He never changed his mind,' Mr. Steichen says.").

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From what I saw, for PWC, Marius Kohl was something of the goose that laid the golden egg When Marius Kohl called, it was a bit like it was the Pope or Barack Obama on the other end of the line From the moment we learned that he was preparing to retire at the end of 2013, it was not a panic, but there was still a moment of tension. It was necessary to do a maximum of rulings as long as he was still in place. Because everyone understood that he would be replaced by several officials and that things would not happen as before. And above all, that it would not be as simple, or as fast as with Marius Kohl alone.¹⁶⁸

And, in fact, the rulings process at Sociétés 6 described above seems to have ended not when LuxLeaks exploded in November 2014, but about a year earlier, when Kohl took early retirement¹⁶⁹ in October 2013.¹⁷⁰

Tax adviser trust likely did not rest solely on the actions of the tax administration or faith in Mr. Kohl, however. It is important to taxpayers to know that a ruling they receive will be upheld by the relevant courts if challenged. Because its rulings procedure was uncodified, “the Luxembourg tax rulings practice was governed by general principles of law such as the principle of good faith and legitimate trust (*principe de bonne foi et de confiance légitime*).”¹⁷¹ The doctrine of *confiance légitime* (legitimate expectations) has German origins¹⁷² and “is gradually being enshrined in the case law of the Court of Justice of the European Union . . . as a result of various German preliminary rulings”¹⁷³ It is a reliance doctrine “based on the assumption that, where a public body states that it will or will not do something, a person who has reasonably relied on that statement should be entitled to enforce it; if necessary,

168. Luc Caregari, *Luxleaks «Marius Kohl, c'était la poule aux œufs d'or»*, WOXX (Nov. 3, 2016), <https://www.woxx.lu/luxleaks-marius-kohl-cetait-la-poule-aux-oeufs-dor/> [<https://perma.cc/7VA4-R8EU>] (original in French).

169. Sprackland, *supra* note 135 (“In 2013, Mr. Kohl took early retirement . . .”).

170. See Thomas, *supra* note 80 (“In October 2013, Marius Kohl retired. Since then, the rulings-producing machine has jammed up.”) (original in French); see also Thomas, *supra* note 13 (“When, in the spring of 2013, Marius Kohl announced his intention to retire, the news sparked consternation.”) (original in French). Cf. Karnitschnig & van Daalen, *supra* note 12 (“Foreign companies flocked to the tiny country during [Kohl’s] tenure because of the speed and ease of the approval process, local tax advisers say.”).

171. Patrick Mischo & Franz Kerger, *After “Lux Leaks”: Welcome Changes to Luxembourg’s Tax Ruling Practice*, 77 TAX NOTES INT’L 1197, 1197 (2015).

172. Fatima Chaouche, *Décisions fiscales anticipées et confiance légitime État des lieux et retour sur la notion d’opposabilité*, in DROIT FISCAL LUXEMBOURGEOIS - LIVRE JUBILAIRE IFA LUXEMBOURG 48 (2018) (“Le principe de confiance légitime communément désigné comme le principe de protection de la confiance légitime ou de légitime confiance est un principe d’origine allemande.”).

173. *Id.* at 49.

through the courts.”¹⁷⁴ Thus, tax advisers likely expected that Luxembourg courts would uphold the ACD’s tax rulings if they were challenged.

In addition, the Luxembourg government apparently was aware of the importance to taxpayers of relying on the rulings they received. In 1997, Jeannot Krecké¹⁷⁵ wrote a report on tax fraud in Luxembourg titled “Rapport Sur la Fraude Fiscale au Luxembourg.”¹⁷⁶ Although the published version of the report did not contain a section on tax rulings,¹⁷⁷ a suppressed page¹⁷⁸ containing that section¹⁷⁹ was ultimately revealed in 2015, as discussed below.¹⁸⁰

That page begins by stating that “[t]he practice of ‘ruling’ or the practice of ‘prior agreement with the administration’ is not part of our tax legislation.”¹⁸¹ The second paragraph of the page focuses on Sociétés 6, stating “the Sociétés VI tax office is often asked to opine in advance on minimum taxable margins in order to reassure the taxpayer and to avoid future tax assessments”¹⁸² The third paragraph suggests that rulings should be given with “a maximum of guarantees,” to prevent the tax authority from changing its position after the taxpayer relied on it:

As it is legitimate for the taxpayer to know with certainty the tax rules surrounding its activities, the practice of tax rulings can hardly be criticized. At best, these tax rulings should be surrounded by a maximum of guarantees, in order to prevent the tax administration, if it has misled the taxpayer by

174. Craig Connal, *Legitimate expectation as a ground for judicial review*, OUT-LAW (June 16, 2017), <https://www.pinsentmasons.com/out-law/analysis/legitimate-expectation-as-a-ground-for-judicial-review-> [<https://perma.cc/UW2Q-PSYC>].

175. Eric Maurice, *Juncker produces missing page on tax rulings*, EU OBSERVER (Sep. 30, 2015), <https://euobserver.com/economic/130501> [<https://perma.cc/7TS2-3WHE>]. Krecké “was at the time vice-president of the Luxembourg Socialist Workers’ Party (LSWP).” *Id.*

176. *See* Rapport Sur la Fraude Fiscale au Luxembourg (Apr. 16, 1997), <https://www.lequotidien.lu/wp-content/uploads/2015/09/97-rapport-sur-la-fraude-fiscale-au-luxembourg-Krecke.pdf> [<https://perma.cc/4DTN-QCYD>].

177. EUR. PARL., *Parliamentary Questions, Krecké Report* (May 6, 2015), https://www.europarl.europa.eu/doceo/document/E-8-2015-009264_EN.html [<https://perma.cc/QP4D-RYYR>] (stating that “several pages dealing with tax ruling practices were not published, as they were considered too sensitive for public exposure.”).

178. The author of the report, Jeannot Krecké, reportedly intentionally withheld the page from the public version of the report. *See infra* notes 220-223 and accompanying text.

179. Krecké Page, *supra* note 87. The section on tax rulings starts on that page and takes up about three-fourths of the page, so it does not appear to continue beyond that page. *See id.*

180. *See infra* note 229 and accompanying text.

181. Krecké Page, *supra* note 87 (original in French).

182. *Id.* (“[L]e bureau d’imposition Sociétés VI est souvent sollicité à se prononcer à l’avance sur des marges minimales imposables afin de rassurer le contribuable et d’éviter à l’avenir des taxations d’office suivant le § 217 AO”) (the translation, by the author, omits the statutory cite).

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incorrectly analyzing the law, from refusing to apply the tax ruling to a taxpayer who has nevertheless complied with it, on the grounds of its illegality.¹⁸³

The concern that Luxembourg subsequently would reverse prior positions proved somewhat prescient. Fatima Chaouche has pointed out that, beginning in November 2013—the month after Kohl retired¹⁸⁴—the tax administration began to reverse some of its prior rulings. Chaouche observes:

If we look at the first wave of rulings that the administration called into question... it is quite clear that the tax administration was reversing its own positions long before the revelations of the Luxleaks affair. Some of these administrative reversals appear, in fact, as early as November 2013, and most for this type of ruling were between February and November 2014.

It is therefore not, initially, pressure from the international community or the European Commission that explains these first administrative reversals, but the replacement of the employee in charge of the tax office through which the vast majority of these decisions passed.¹⁸⁵

In addition, in a December 2016 Circular that provided more precise transfer-pricing rules, the ACD announced that its previous APAs were no longer binding,¹⁸⁶ prospectively.¹⁸⁷ The Circular invited companies to reapply

183. *Id.* (original in French).

184. Thomas, *supra* note 80 (“En octobre 2013, Marius Kohl est parti à la retraite.” meaning “In October 2013, Marius Kohl retired.”).

185. Fatima Chaouche, *Les Rulings Sont Morts, Vivent Les Rulings !*, 68 J. DES TRIBUNAUX LUXEMBOURG 6 (Apr. 2020) (footnotes omitted) (original in French), <https://ssrn.com/abstract=3624729> [<https://perma.cc/38SF-7MLZ>].

186. *See* Circulaire du directeur des contributions L.I.R. – n° 56/1 – 56bis/1 du 27 décembre 2016 ¶ 33, <https://impotsdirects.public.lu/dam-assets/fr/legislation/legi16/circulairelir561-56bis1-27122016.pdf> [<https://perma.cc/3M73-JP9Y>] (“Any individual administrative decision relating to the arm’s length principle made on the basis of the rules applicable before the entry into force of Article 56bis L.I.R. no longer binds the ACD as of January 1, 2017 for tax years after 2016.”) (original in French); *see also* Thomas, *supra* note 80 (“With its circular at the end of December, the ACD declared that from the 2017 tax year, it was no longer bound by some 500 APAs.”) (original in French).

187. The legal certainty principle in Luxembourg restricts retroactive revocation of tax rulings. “The principle of legal certainty requires that laws be made public, be definite with enough clarity, not have retroactive effect, and protect legitimate interests and expectations.” Melanie Delvaux & Michael Klotz, *The legal certainty principle in Luxembourg tax law*, INT’L TAX REV. BLOG (July 19, 2021), <https://www.internationaltaxreview.com/article/b1srwqvhg3h6kp/the-legal-certainty-principle-in-luxembourg-tax-law> [<https://perma.cc/XKJ9-FQLS>].

That blog reports on a 2021 decision by Luxembourg’s Constitutional Court, and explains:

While the legal certainty principle has long been recognised by the Luxembourg administrative courts and, at the supranational level, by the European Court of Human Rights and the European Court of Justice (ECJ), it is not codified in the Constitution and the Constitutional Court had not ruled previously on its constitutional recognition or value.

under the new procedures.¹⁸⁸ Similarly, Luxembourg announced in 2019 that its rulings issued before January 1, 2015, have no legal effect after the end of 2019.¹⁸⁹ Taxpayers were told they could reapply under the current process,¹⁹⁰ which limits the effectiveness of rulings to a five-year period.¹⁹¹ Previously, while some of Luxembourg's rulings covered a finite period,¹⁹² some were indefinite,¹⁹³ which is not the case in all countries.¹⁹⁴

Luxembourg tax advisers were also no doubt aware of the tension between the benefits of the informal rulings process and the risk that the rulings would not be upheld. In fact, there reportedly was an unsuccessful movement among Big Four firms to have Luxembourg's rulings process codified, years before it actually happened:

It was in 2010 that Big Four tax leaders began to get nervous. They had promised legal certainty to their clients. However, doubts surfaced over whether the tax rulings were going to hold up as a legal matter. The rulings were based on a memorandum of August 1989, hastily typewritten, and the pragmatism of a single bureau chief. "We sensed that something would happen and that the legal basis of rulings was not sufficient," recalls Georges Deitz, former tax leader of Deloitte. The tax experts of the four major audit firms (PWC, Deloitte, EY and KPMG) requested an appointment with Finance Minister Luc Frieden . . . and submitted to him a text they had devised as the basis of a draft law.¹⁹⁵

188. Circulaire du directeur des contributions L.I.R. – n° 56/1, *supra* note 186, at ¶34 ("Companies wishing to benefit from a new decision should submit to the competent tax authorities a new request that fulfills the conditions provided in chapter 5 of this Circular.") (original in French).

189. Loi du 20 décembre 2019 concernant le budget des recettes et des dépenses de l'État pour l'exercice 2020 Art. 5, <https://legilux.public.lu/eli/etat/leg/loi/2019/12/20/a886/jo> [<https://perma.cc/58R2-5CNP>] ("Advance rulings issued before January 1, 2015 automatically cease to have effect at the end of the 2019 tax year.") (original in French).

190. See ADMINISTRATION DES CONTRIBUTIONS DIRECTES, *Newsletter du 3 Décembre 2019* (Dec. 2019), <https://impotsdirects.public.lu/fr/archive/newsletter/2019/nl03122019.html> [<https://perma.cc/YWV2-JZ3>] ("by virtue of [the amendment's] paragraph (2), affected taxpayers may submit a new request for a ruling.") (original in French).

191. See *infra* note 279 and accompanying text.

192. Karnitschnig & van Daalen, *supra* note 12 ("once approved, a structure [wa]s binding [on the tax office] for five years . . .").

193. See Chaouche, *supra* note 185, at 11 ("The old regime did not provide for a specific time limit, and some of these decisions were issued on an indefinite basis, obligating the tax administration to honor them in any event until the end of 2019.") (original in French).

194. Many rulings do not cover ongoing transactions. However, APAs, which address transfer pricing do. See *supra* text accompanying notes 157-162. In the United States, APAs typically cover periods of three to five years. Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 515 (2017). For a sense of the duration of tax rulings in various European countries as of 1999, see Simmons & Simmons Annex, *supra* note 147 (Q. 2.3(B), "Do rulings or advance agreements last for a specific period of time?").

195. Thomas, *supra* note 107 (original in French).

At that time, the process did not move forward; the draft “disappeared into the drawers.”¹⁹⁶ Luxembourg tax lawyer Alain Steichen, a private practitioner, reportedly argued against formalization at the time; he was quoted in the *Lëtzebuurger Land* as stating “the more we gave ourselves rules, the more we were open to attack.”¹⁹⁷ Thus, in this instance, flexibility won out over increased certainty. That may reflect tax advisers’ trust in the tax-rulings system as it existed at the time.

Thus, the relationship between Luxembourg tax advisers and the tax administration seems to have been a comfortable one. The fact that when the OECD required exchanges of summaries of past rulings, the tax administration enlisted the help of tax advisers in doing that¹⁹⁸ may be a reflection of that relationship. It also meant that interested parties provided information in the first instance with respect to many of the past rulings that Luxembourg exchanged. That appears to still be the case: the form on the Luxembourg website, which calls in part for a “[s]hort summary of the issue covered by the ruling...” is currently required to be submitted in conjunction with rulings requests.¹⁹⁹

2. LuxLetters

A more recent episode also suggests trust in the Luxembourg tax administration. In July 2021, a group of European newspapers in conjunction with the Tax Justice Network (TJN) and the Signals Network reported on an investigation called “LuxLetters.”²⁰⁰ The investigation found that, in 2015—when Luxembourg’s codified rulings process began—an informal process

196. *Id.*

197. *Id.*

198. *See supra* notes 47-51 and accompanying text.

199. Administration des contributions directes, *Échanges électroniques*, https://impotsdirects.public.lu/fr/echanges_electroniques/777E.html [<https://perma.cc/3669-2D42>] (“The use of form 777 E is mandatory when submitting an application for an advance tax ruling.”) (last visited Jan. 18, 2024) (original in French). Form 777 E can be downloaded at <https://impotsdirects.public.lu/fr/formulaires/collectivites.html> [<https://perma.cc/D6DV-HMJQ>] (last visited Jan. 22, 2024).

200. *See EU and OECD half-measures fail to detect Luxembourg’s shadow tax rulings*, TAX JUST. NETWORK (July 1, 2021), <https://taxjustice.net/press/eu-and-oecd-half-measures-fail-to-detect-luxembourgs-shadow-tax-rulings/> [<https://perma.cc/R7DA-EK3H>] (“An international investigation conducted by Le Monde, Süddeutsche Zeitung, El Mundo, Woxo and Investigative Reporting Project Italy, with the Tax Justice Network and The Signals Network, reveals the existence and application of secret tax practices in Luxembourg that breach EU transparency rules.”) [hereinafter TAX JUST. NETWORK].

known as “information letters” arose in Luxembourg.²⁰¹ The information-letters process allegedly existed alongside the official tax rulings process.²⁰²

Information letters are not issued by the tax administration. Rather, they reportedly are letters sent by a tax adviser to the tax administration detailing a planned tax position. TJN stated that “[a]ccording to sources familiar with the practice, the process involves a careful dance of nods and winks through which information letters are unofficially given consent by the tax authority.”²⁰³ TJN further reported the mechanics as follows:

The procedure for receiving quasi-official endorsement by the tax administration for desired tax positions apparently combines oral discussions between high level staff in accounting and law firms, and the tacit understanding that a non-response by the tax administration to written information letters sent by the firms to the tax administration implies that the practice is acceptable and would not be challenged in the subsequent tax return. In the rare event of disagreement by the tax administration, it would reach out to the firm by phone or request a meeting to discuss.²⁰⁴

The information-letter process reportedly was a secret one.²⁰⁵ It appears to have relied on an understanding between tax advisers and the tax administration. Compared to a formal ruling, “[a]ccording to the newspapers, using information letters is an ‘informal and less efficient’ practice, which nevertheless still allows clients to save taxes.”²⁰⁶ Informality runs the risk of tax administration reversal of its position, as discussed above.²⁰⁷ Thus, reliance on an information letter would be based on trust in the tax administration.

It is possible that an information letter sent to the tax administration has no more value than a tax opinion issued by that adviser. The Luxembourg government made that claim when TJN reported on LuxLetters.²⁰⁸ However, Luxembourg tax advisers may have perceived, or at least claimed, that the arrangement offered more than that. The newspaper *Woxx* reported:

201. Maxime Vaudano, Jérémie Baruch & Anne Michel, « LuxLetters » : la nouvelle astuce pour contourner la transparence fiscale au Luxembourg, LE MONDE (July 1, 2021) (“Deployed around 2015 to fill the void created by the end of the old generation of rulings, these letters were intended to test the tax administration on the nature of the strategies still accepted in Luxembourg.”) (original in French).

202. *Id.*

203. TAX JUST. NETWORK, *supra* note 200.

204. *Id.*

205. *See infra* text accompanying note 236.

206. *Several European newspapers accuse Luxembourg of circumventing EU regulations*, RTL (July 2, 2021), <https://today.rtl.lu/news/luxembourg/a/1748106.html> [<https://perma.cc/XW25-4VBX>].

207. *See supra* text accompanying notes 183-195.

208. *See infra* text accompanying note 238.

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As one source puts it: “A law firm in Luxembourg offers more stable legal opinions than a firm in other countries, Austria for example. The lawyer will very easily say [to his client] that ‘the tax treatment will be like this’ and that it will not be questioned: his position is comfortable.”²⁰⁹

Such a claim, even if exaggerated, asserts trust in the tax administration.

B. Secrecy

Before they were leaked, Luxembourg’s tax rulings were confidential.²¹⁰ The rulings process, too, apparently was not publicly known. Surprisingly, a 2007 OECD report states that Luxembourg did not issue private rulings.²¹¹ One article attributes that finding to the idea that Luxembourg’s tax rulings “system was ‘camouflaged,’”²¹² perhaps meaning that it was known only to insiders. Luxembourg’s tax-rulings system was discussed in detail in the 1999 Simmons & Simmons report on “Administrative Practices in Taxation”²¹³ prepared for the European Commission, but that report was not made public until 2015.²¹⁴

Luxembourg does not seem to be alone in having an opaque tax-rulings system.²¹⁵ The Netherlands reportedly did at times, as well:

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209. Luc Caregari, *Luxletters: Comme une lettre à la poste ?*, WOXX (July 1, 2021), <https://www.woxx.lu/luxletters-comme-une-lettre-a-la-poste/> [<https://perma.cc/DJK7-57LD>] (original in French).
210. Wayne L. Nesbitt, Edmund Outslay & Anh Persson, *The Relation Between Tax Risk and Firm Value: Evidence from the Luxembourg Tax Leaks 1* (Mar. 2017), <https://ssrn.com/abstract=2901143> [<https://perma.cc/B3CR-K9DU>]; see also Karnitschnig & van Daalen, *supra* note 12.
211. *Tax Administration in OECD and Selected Non-OECD Countries*, Comparative Information Series 2006 88 tbl. 17 (Feb. 2007), www.oecd.org/tax/forum-on-tax-administration/publications-and-products/comparative/CIS-2006.pdf [<https://perma.cc/X5WH-WRHU>].
212. Wojciech Morawski, *Will the European Union put an end to the “golden age” of tax ruling?*, 3 ACTA UNIVERSITATIS CAROLINAE–IURIDICA 53, 56 (2020), citing *Tax Administration in OECD and Selected Non-OECD Countries*, Comparative Information Series 2006 88 (Feb. 2007), www.oecd.org/tax/forum-on-tax-administration/publications-and-products/comparative/CIS-2006.pdf [<https://perma.cc/G2FP-F6E9>].
213. Simmons & Simmons, *Administrative Practices in Taxation* (1999), <https://circabc.europa.eu/sd/a/7bd1cec2-7eb4-46f2-ae46-d05c323ef0b5/02%20STUDY.pdf> [<https://perma.cc/7JYF-7W78>]. The individual countries’ questionnaire responses appear in Simmons & Simmons Annex, *supra* note 147.
214. Theo Keijzer, *Why a 1999 EU Study Was Kept a Secret Till Now: France Made Tax Deals Outside the Law*, KLUWER INT’L TAX BLOG (Nov. 1, 2015), <http://kluwertaxblog.com/2015/11/01/why-a-1999-eu-study-was-kept-a-secret-till-now-france-made-tax-deals-outside-the-law/> [<https://perma.cc/HB2G-GUD3>].
215. Cf. Jennifer Carr, *Transparency? Informal and Invisible Guidance in Kentucky*, 65 ST. TAX NOTES 303, 304 (2012) (in Kentucky during the period that rulings were confidential, one lawyer commented that “someone who practices tax only occasionally may not even know what to do, given the DOR’s [Department of Revenue’s] unadvertised and informal approach to providing written guidance.”).

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By the end of the 20th century, the worldwide reputation of the Netherlands' tax ruling practice was well established There was no transparency as to what the agreements entailed. One author observed: "A small number of specialized ruling inspectors, a small circle of internationally operating advisers, no publicity. Here are the elements that created an atmosphere of secrecy, of horse trading within the tax world, including within the tax administration itself."²¹⁶

LuxLeaks, which revealed previously confidential tax rulings, was a major breach of secrecy. In fact, Luxembourg prosecuted both leakers and the reporter to whom they leaked the rulings.²¹⁷ It was not just the specific content of the rulings that gave rise to scandal. After all, the rulings are lengthy and complex—difficult for the public to understand.²¹⁸ The focus of the scandal was special tax deals granted to multinationals via a previously hidden process.²¹⁹

Recall that the 1997 Krecké report on tax fraud in Luxembourg omitted the page on tax rulings.²²⁰ This was not accidental.²²¹ "Mr[.] Krecké has said he did not release the page originally as he deemed it too sensitive for public disclosure."²²² He added, "My decision was based on the fact that I did not find it appropriate to launch an international discussion on tax rulings during our presidency' [of the European Union]"²²³

216. Vleggeert & Vording, *supra* note 89, at 399-400 (quoting JM Schellekens, *Inzicht in de rechtsbasis*, in 'Rulings', Lustrumcongres georganiseerd ter gelegenheid van het eerste lustrum van de Groninger Fiscale Eenheid, Groningen 1987, 8-9 (original in Dutch)).

217. Marian, *supra* note 29, at 282.

218. *See supra* text accompanying notes 138-143.

219. *See* Marian, *supra* note 2, at 6 ("Publicly dubbed 'LuxLeaks,' the leak allegedly exposed a systemic practice by which LACD [the Luxembourg ACD] aided MNCs to dramatically cut their tax bills in jurisdictions other than Luxembourg."); *see also* *LuxLeaks whistleblower 'shocked' by tax breaks*, LUXEMBOURG TIMES (Apr. 29, 2016), <https://www.luxtimes.lu/luxembourg/luxleaks-whistleblower-shocked-by-tax-breaks/1233019.html> [<https://perma.cc/5KFR-PLCH>] ("A whistleblower who helped expose sweetheart tax deals to multinationals in Luxembourg told a court Friday he had decided to do his duty as a citizen after he was 'shocked' by Luxembourg's huge tax breaks for multinational firms.").

220. *See supra* text accompanying notes 175-180.

221. EUR. PARL., *supra* note 177 ("several pages dealing with tax ruling practices were not published, as they were considered too sensitive for public exposure. This has been confirmed internally by Jeannot Krecké and never officially denied by the Luxembourg Government.").

222. Matthew Holehouse, *EU's Juncker Releases Secret 'Luxleaks' Tax Advice*, THE TEL. (Sept. 30, 2015), <https://www.telegraph.co.uk/news/worldnews/europe/eu/11902939/EU-Juncker-releases-secret-Luxleaks-tax-advice.html> [<https://perma.cc/4RGX-AYL5>].

223. *Id.*; *see Juncker warned about Luxembourg tax deals in 1997*, LUXEMBOURG TIMES (Oct. 2, 2015), <https://luxtimes.lu/archives/9709-juncker-warned-about-luxembourg-tax-deals-in-1997> [<https://perma.cc/SXE7-WEYB>] ("Krecké had deliberately removed the chapter on tax rulings from the official version published in 1997 in order not to offend then premier Juncker, as Luxembourg prepared at the time to assume the rotating presidency of the EU.").

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The confidential nature of Luxembourg’s rulings practice meant that it had little oversight outside of Luxembourg. Within Luxembourg, the extent of the oversight is not clear. The final paragraph on the suppressed page of the 1997 Krecké report urged closer oversight by the government, to ensure that administrative practices reflected government policies:

The rapporteur [author of the report] can understand and accept the pragmatic approach chosen by the tax office, but *he suggests to the relevant minister to follow a little more closely the “agreements” thus made.* From the moment when the political powers are clearly aware of these practices, they can intervene in the event that the informal rules applied are no longer in line with Government policy.²²⁴

It is not clear if that oversight took place. There also appears to be no record of Luxembourg investigating Sociétés 6 following LuxLeaks.²²⁵ In 2022, the journal *Tax Notes* reported that “Luxembourg believes it has done enough to counter tax avoidance and aggressive tax planning, Paul Tang, chair of the European Parliament’s subcommittee on tax affairs, said.”²²⁶

Although the page in the Krecké report containing that call for oversight was suppressed, there is every indication that page was received by those empowered to oversee Sociétés 6. Jean-Claude Juncker—the official who Marius Kohl told the *Wall Street Journal* never complained about his work²²⁷—reportedly was one of three recipients of the version of the Krecké report that included that page.²²⁸ Juncker is the one who disclosed the page in 2015 (shortly after denying that he was aware of it).²²⁹ Mr. Juncker became the

Luxembourg was president of the Council of the European Union from July to December 1997, and the United Kingdom took over the Presidency of the Council on January 1, 1998. COUNCIL OF THE EUROPEAN UNION, *Presidency of the Council of the EU*, <https://www.consilium.europa.eu/media/56827/past-presidencies.pdf> [<https://perma.cc/5YRU-YYRF>] (last visited Jan. 19, 2024).

224. Krecké Page, *supra* note 87 (emphasis added) (original in French, as follows: “Le rapporteur peut comprendre et admettre la démarche pragmatique choisie par le bureau d’imposition, mais il suggère au ministre compétent de suivre d’un peu plus près les ‘accords’ ainsi opérés. A partir au moment où le pouvoir politique est clairement au courant de ces pratiques, il peut intervenir au cas où les règles informelles appliquées ne seraient plus en concordance avec la politique menée par le Gouvernement.”).

225. Marian, *supra* note 29, at 282.

226. Elodie Lamer, *Luxembourg Claims It’s Done Enough to Counter Tax Avoidance*, 108 TAX NOTES INT’L 597 (Oct. 31, 2022).

227. *See supra* text accompanying note 133.

228. Véronique Poujol, *Un rapport sur les rulings de 1997 en édition limitée*, PAPERJAM (Nov. 12, 2014), <https://paperjam.lu/article/news-un-rapport-sur-les-rulings-en-edition-limitee> [<https://perma.cc/ZTN8-GUK7>] (“The circulation of this unaltered version of the report on tax fraud would be limited, according to our information, to three copies, one of which had been given to Jean-Claude Juncker.”) (original in French).

229. *See* Parlementaire Monitor, *Juncker produces missing page on tax rulings* (Sept. 30, 2015), https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vjxrqoezt3xg?ctx=vi38jaxg5zqp&tab=1&start_tab0=575 [<https://perma.cc/3S4T-FJL9>] (“Two
footnote continued on next page”)

Minister of Finance of Luxembourg in 1989²³⁰—the same year the Luxembourg tax office, the ACD, wrote the short internal memorandum on tax rulings mentioned above.²³¹ In 1997, the year of the Krecké report, Juncker was both Minister of Finance²³² and Prime Minister of Luxembourg.²³³

It is not clear whether Mr. Juncker heeded the report's advice to follow the content of the rulings more closely. What is clear is that Luxembourg's rulings during the Kohl era lacked international oversight. It was not until after the 2014 LuxLeaks scandal that the OECD and European Commission began requiring exchanges of tax-rulings information.²³⁴ Lack of transparency meant a lack of accountability regarding the content of the rulings.²³⁵

The information-letter process that reportedly developed alongside the 2015 codified rulings process also reportedly was secret. TJN stated that “[i]n what was presumably an attempt to prevent just the sort of public exposure now occurring, only the most senior executives of accountancy firms and members of the tax authority have access to the information letters.”²³⁶

The Luxembourg newspaper *Woxx* reported that “when searching on the professional social network LinkedIn, we find employees of audit firms who list it [(information-letter work)] among their professional skills—which at least proves their existence.”²³⁷ However, the Luxembourg government denied the reports that the tax administration signed off on such letters, stating:

The claims made are false and entirely unsubstantiated: there is no such thing in Luxembourg as an informal or oral confirmation by tax authorities of a taxpayer's tax position based on letters written either by taxpayers themselves or their tax advisors. Any such correspondence with the tax administration would

weeks after telling MEPs [Members of the European Parliament] he didn't know about a missing page in a report on Luxembourg tax rulings, European Commission president Jean-Claude Juncker sent it . . . to an MEP.”)

230. JACQUES DELORS INST., *Jean-Claude Juncker*, <https://institutdelors.eu/en/tous-les-contributeurs/jean-claude-juncker/> [<https://perma.cc/CP2V-WGWT>] (last visited Jan. 18, 2024).

231. *See supra* note 80 and accompanying text. Marius Kohl worked at Sociétés 6 in 1989 and became its head in approximately 1991. *See supra* note 121.

232. Mr. Juncker was Minister of Finance of Luxembourg from 1989 through 2009. JACQUES DELORS INST., *Jean-Claude Juncker*, *supra* note 230.

233. Mr. Juncker served as Prime Minister of Luxembourg from 1995 to 2013. BRITANNICA, *Jean-Claude Juncker*, <https://www.britannica.com/biography/Jean-Claude-Juncker> [<https://perma.cc/V7AH-GMWS>] (last updated Dec. 5, 2023). Subsequently, from 2014 to 2019, he served as president of the European Commission. *Id.*

234. *See infra* note 296.

235. *See* Lederman, *supra* note 39, at 275-76.

236. TAX JUST. NETWORK, *supra* note 200.

237. Caregari, *supra* note 209 (original in French).

be purely unilateral, and can in no way be considered as binding on the tax administration or even be interpreted as confirmation of a given tax situation.²³⁸

Such an informal procedure, if it existed, would sidestep the official process, including circumventing exchange with other countries' tax administrations,²³⁹ by flying under the radar.²⁴⁰ *Woxx* further reported, "What makes this [information letter] practice suspect is that it appears at the same time as tax rulings begin to decline—highlighting the idea that it was created to compensate for rulings that have become less attractive due to exchange."²⁴¹ In other words, increased transparency may not only have deterred taxpayers from seeking rulings, it may have drawn some of them to a new opaque process.

It seems unlikely, however, that many large multinational companies viewed as akin to a tax ruling a process that could easily be (and ultimately was) disavowed by the Luxembourg government. Other places such companies may have looked to replace the flow of Luxembourg tax rulings are discussed in the next Part.

III. After LuxLeaks: Where Have All the Rulings Gone?

Parts I and II showed how Luxembourg's tax-rulings system developed and how the elements of tax agency amenability, tax-adviser trust, and secrecy

238. *LuxLetters, Statement by the Luxembourg Government on press articles published about tax rulings and so-called information letters*, GOUVERNEMENT.LU (July 4, 2021), <https://gouvernement.lu/en/dossiers/2021/luxletters.html> [<https://perma.cc/NEX4-GGFD>].

239. Lara Dihmis, *LuxLetters' Investigation Uncovers Tax Loophole in Luxembourg*, OCCRP (July 6, 2021), <https://www.occrp.org/en/daily/14769-luxletters-investigation-uncovers-tax-loophole-in-luxembourg> [<https://perma.cc/4DNE-KRFA>] ("In an attempt to end such abusive practices, the EU started in 2015 requiring that member states declare their cross-border tax agreements to the European tax authorities. LuxLetters, however, reveals how authorities and corporations have found a way to circumvent this rule.")

240. Whether oral, potentially nonbinding agreements fall within the scope of the Directive is a different question. *Woxx* reported that "the European Commission ... informed us that it was 'not aware of such practices and that in order to take a more informed position, it would need more information.' However, the Commission maintains that it remains attached to a 'very broad' definition of what can fall within the ... directive" Caregari, *supra* note 209 (original in French). The definition of "advance cross-border ruling" in the E.U. directive is broad: "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" that meets certain conditions, such as being issued in advance of the contemplated transaction and upon which the recipient(s) "is entitled to rely" Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU(1)(b)14, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32015L2376> [<https://perma.cc/N6R5-UXML>] [hereinafter Council Directive]. Luxembourg's Ministry of Finance stated that "Section 29a of the Tax Code strictly regulates the procedure for issuing tax rulings so that any kind of 'non-binding rulings' are excluded from the outset." *LuxLetters, FAQ*, *supra* note 8, at 2.

241. Caregari, *supra* note 209 (original in French).

allowed it to flourish. This Part examines what happened after Luxembourg abandoned that system, including the timing of codification of a new, formalized rulings procedure and the follow-on impacts of codification.

A. The Timing of Codification of the Rulings Process

LuxLeaks erupted on November 5, 2014, with the publication of the first batch of documents—a set of 548 rulings and other PwC documents.²⁴² The ICIJ published the second, smaller batch of documents on December 9, 2014.²⁴³ Luxembourg codified its rulings practice on December 19, 2014,²⁴⁴ making the procedure public.²⁴⁵ The new law took effect on January 1, 2015.²⁴⁶

At first glance, the codification date could suggest that Luxembourg codified its rulings procedure in quick response to the LuxLeaks scandal. However, Luxembourg’s Minister of Finance, Pierre Gramegna, had submitted the codification provision prior to LuxLeaks. Codification was part of a lengthy bill, the *Zukunftspak* (meaning “package for the future”),²⁴⁷ which Gramegna had submitted to the Luxembourg Parliament on October 15, 2014.²⁴⁸ The *Land* reported that “[t]he legal framework for rulings was

242. See *supra* note 1 and accompanying text; see also Marian, *supra* note 2, at 8 (“The first [LuxLeaks batch], which included 548 documents issued to 340 MNCs, was made public in November 2014. This batch was leaked by Antoine Deltour, a former employee at PwC’s Luxembourg office. Naturally, the documents leaked by Deltour contained mostly documents drafted or submitted by PwC.”).

243. See ICIJ, *supra* note 7.

244. Kaye, *supra* note 37, at 1189.

245. Mischo & Kerger, *supra* note 171, at 1198 (“The main purpose ...[wa]s to codify the tax ruling practice to make it more transparent and to clarify the applicable filing and issuing procedures.”).

246. Recueil De Legislation, Paquet D’avenir, A – N°257 at 5475-764 Art. 4 (“Loi Générale des Impôts”) (Dec. 24, 2014), https://impotsdirects.public.lu/dam-assets/fr/legislation/legi14/Memorial-A---N_-257-du-24-decembre-2014.pdf [<https://perma.cc/ED4D-K962>] (enactment of § 29A); *id.* at 5488 Art. 42 (effective date).

247. See *Projet De Loi N°6722, Chambre des Députés Session ordinaire 2014-2015*, at 8, https://impotsdirects.public.lu/dam-assets/fr/archive/newsletter/2014/nl_27102014/Projet-de-loi-N_-6722-relative-a-la-mise-en-oeuvre-du-paquet-d_avenir---premiere-partie-_2015_.pdf [<https://perma.cc/T93Z-YJV3>] (*Zukunftspak*, loi de mise en oeuvre du paquet d’avenir).

The *Zukunftspak* also codified the arm’s length principle for transfer pricing. *Id.* at 48 Art. 13 (“when ... conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, the profits of these enterprises will be determined according to the conditions prevailing between independent enterprises and taxed accordingly.”) (original in French).

248. See *id.* at 7 (reflecting Gramegna’s signature and the October 15, 2014 date. See also *id.* at 20 (page number 12 of the *Zukunftspak*, listing “Formalisation des décisions anticipées” (formalization of advance decisions) under “Ministère des Finances” (Finance Ministry));
footnote continued on next page

ultimately drawn up in the summer of 2014, then buried among the 260 measures of the Zukunftspak presented in October 2014.”²⁴⁹

As submission of the rulings-codification provision occurred before the LuxLeaks revelations, one possible explanation is that LuxLeaks simply helped expedite the codification process.²⁵⁰ That may be what ultimately happened. However, the existence of leaked tax rulings was known before November 2014, including, it appears, by Luxembourg’s Minister of Finance.

First, an early public release of Luxembourg rulings occurred in May 2012, when journalist Édouard Perrin aired some of the leaked rulings in an exposé on the French television show *Cash Investigation*.²⁵¹ Perrin reportedly also shared documents with the BBC in the United Kingdom, which also reported on them in May 2012.²⁵²

The *Cash Investigation* episode, titled “Paradis fiscaux: les petits secrets des grandes entreprises” (“Tax havens: The little secrets of big companies”), is an hour long and focuses on Luxembourg tax rulings.²⁵³ The episode refers to an anonymous source having provided “a large dossier—47,000 pages of top-secret documents.”²⁵⁴ The episode shows PwC letterhead²⁵⁵ and documents stamped by Sociétés 6 and reportedly signed by Marius Kohl.²⁵⁶ The coverage includes a

id. at 3 (providing a date of October 13, 2014 for the “Arrêté Grand-Ducal de dépôt” (Grand-Ducal deposit order) and an October 15, 2014 date for the “Dépôt” (deposit)).

249. Thomas, *supra* note 80 (original in French).

250. See Mischo & Kerger, *supra* note 171, at 1197 (“On October 15, 2014—that is, before the tax rulings were leaked to the public—the Luxembourg minister of finance submitted a draft law along with the Luxembourg draft budget law for 2015 to the Luxembourg parliament to create a legal framework for tax rulings in Luxembourg.”). Cf. Kaye, *supra* note 37, at 1189 (“The Luxembourg tax ruling procedures were heavily criticized after the LuxLeaks scandal, which probably assured speedy legislative action.”).

251. See Tony Todd, *LuxLeaks Whistleblower Trial Begins in Luxembourg*, FRANCE 24 (Apr. 25, 2016), <https://www.france24.com/en/20160425-luxleaks-whistleblower-trail-luxembourg-pwc-deltour> [<https://perma.cc/VF9F-SAEQ>] (“The documents eventually found their way to French journalist Édouard Perrin who broke the story in 2012 in the “Cash Investigation” programme on state-owned France 2 television.”). The documentary “aired on May 11, 2012.” Perrin, *supra* note 5 (also stating that work on the topic began “in August 2011”).

252. See BBC NEWS, *Major UK companies cut secret tax deals in Luxembourg* (May 11, 2012), <https://www.bbc.com/news/business-17993945> [<https://perma.cc/3NMX-AFU7>] (May 11, 2012) (also referring to a BBC One show, *Darragh MacIntyre presents Panorama: The Truth About Tax*, aired on May 14, 2012, <https://www.bbc.co.uk/programmes/b01hgz7y> [<https://perma.cc/7PQE-Y7ZC>]).

253. See *Paradis Fiscaux*, *supra* note 32.

254. *Id.* at 7:14-7:19 (“[u]n gros dossier—quarante sept mille pages de documents ultra-confidentiels.”) (narration transcribed and translated by the author).

255. *Id.* at e.g., 8:09, 11:08, 14:01.

256. *Id.* at e.g., 8:09, 14:16; see also *supra* note 126 and accompanying text.

trip by the show to the ACD in Luxembourg, where Perrin sees some of the facilities.²⁵⁷ He asks to speak to Marius Kohl but is told that Kohl has taken the day off.²⁵⁸ Thus, the ACD was aware of an investigation by a French television show, and anyone who watched the episode would know that a large volume of tax rulings had been leaked.²⁵⁹

Second, the ICIJ stated that its investigation took nine months,²⁶⁰ so it apparently began in early 2014. The *Luxemburger Wort* reported that Luxembourg's Minister of Finance, Pierre Gramegna, had stated that PwC, foreign politicians,²⁶¹ and Pascal St. Amans (then the OECD's Director of the Centre for Tax Policy and Administration) had all warned him about the ICIJ's investigation.²⁶² The *Lëtzebuenger Land* article stated that "[a]ccording to information obtained by the *Land*, the Ministry of Finance even knew when the ICIJ would publish its reports."²⁶³

257. *Id.* at 14:24-19:16. Jake Bernstein reports that "By December [2011], the two [Perrin and Brooks] were filming in Luxembourg." BERNSTEIN, *supra* note 1, at, at 198.

258. *Paradis Fiscaux*, *supra* note 32, at 17:38-17:41 ("Il n'est pas là. Il est en congé aujourd'hui," meaning "He isn't here. He is on leave today."). The show includes footage of the door to Kohl's office with his name on it. *Id.* at 17:29.

259. The "hourlong report for the program *Cash Investigations* aired on Friday, May 11, 2012, at 10:30 pm. Despite the late hour on the eve of a weekend, viewership was double the usual." BERNSTEIN, *supra* note 1, at 199.

260. *See infra* text accompanying note 268.

261. Christoph Bumb, *Hat Gramegna dem Parlament Informationen Vorenthalten?*, LUXEMBURGER WORT, Nov. 13, 2014, <https://www.wort.lu/de/politik/luxleaks-hat-gramegna-dem-parlament-informationen-vorenthalten-5464eb53b9b3988708085eda> [<https://perma.cc/N7QW-G6Q9>] (stating, in part, (1) "Gramegna sagte vor der parlamentarischen Finanzkommission am vergangenen Freitag, dass er unter anderem von ausländischen Politikern mit dem Hinweis konfrontiert wurde: 'Do leeft eppes géint Lëtzebuerg, bereet Iech vir!'" meaning "Gramegna told the parliamentary finance commission last Friday that he was confronted by foreign politicians, among others, with the remark 'Something is going on against Luxembourg, prepare yourselves'" and (2) "Und auch 'PricewaterhouseCoopers' (PwC) habe die Regierung nochmals über das informiert, was da kommen sollte." meaning "And also 'PricewaterhouseCoopers' (PwC) informed the government again about what was to come.") (translations by Google Translate).

262. *Id.* ("Selbst der Luxemburg und seinen Steuerpraktiken nicht unbedingt wohl gesonnene OECD-Direktor für Steuerfragen, Pascal Saint-Amans, habe Gramegna mit den Worten vorgewarnt: 'Maach dech op eppes gefaasst!'" meaning "Even the OECD director for tax matters, Pascal Saint-Amans, who is not necessarily sympathetic to Luxembourg and its tax practices, warned Gramegna with the words 'get ready for something!'" (translation by Google Translate).

263. Michèle Sinner, "*La situation est sous contrôle*", LËTZEBUERGER LAND (Nov. 14, 2014), <http://www.land.lu/page/article/752/7752/FRE/index.html> [<https://perma.cc/ED5X-XLZV>] (original in German, reading "Land-Informationen zufolge wusste man im Finanzministerium sogar, wann das ICIJ seine Berichte veröffentlichen würde.").

Third, and perhaps most interesting, on October 14, 2014—the day before Pierre Gramegna submitted the Zukunftspak bill—the ICIJ sent Mr. Gramegna questions about Luxembourg’s rulings practice.²⁶⁴ The letter from Marina Walker Guevara,²⁶⁵ Deputy Director of the ICIJ,²⁶⁶ begins by introducing herself as the Deputy Director and introducing the ICIJ’s work.²⁶⁷ It then states:

We are contacting you because ICIJ will soon publish a 9-month investigation into the tax breaks that major multinational companies receive in Luxembourg. We are partnering with 31 media organizations from around the world, so please consider this letter a joint request for comment by all media organizations involved

We will appreciate receiving answers to our questions no later than October 20.²⁶⁸

Guevara’s letter included eleven detailed questions.²⁶⁹ The first question reads: “Our research shows that over the past 15 years multinational companies from around the world have systematically used Luxembourg’s tax rulings to obtain significant tax advantages in Luxembourg and elsewhere. Why does Luxembourg help companies avoid hundreds of millions of euros in taxes?”²⁷⁰ The letter includes questions about Sociétés 6 and Marius Kohl.²⁷¹ For example, Question 2 reads, “Our investigation covers the period in which Bureau 6 was led by Mr. Marius Kohl, who had a small staff. How was Bureau

264. *Réponse Commune de Monsieur le Premier Ministre, Ministre d’État et de Monsieur le Ministre des Finances à la question parlementaire N° 696 du 11 novembre 2014 de Monsieur le Député Justin TURPEL concernant la réaction du Gouvernement au courrier de l’ICIJ sur la publication imminente de ses recherches sur les “Tax-Ruling” du Luxembourg*, at 2 (“The Minister of Finance received an email dated October 14, 2014 from the ICIJ, of which a copy is attached.”) (original in French) [hereinafter *Réponse Commune*]. See also Sinner, *supra* note 263 (“Dabei hatte sich das ICIJ bereits am 14. Oktober mit einem sehr konkreten Fragenkatalog an Pierre Gramegna gerichtet, wie das Luxemburger Wort berichtete,” meaning “The ICIJ had already contacted Pierre Gramegna with a very specific set of questions on October 14, as the *Luxemburger Wort* reported.”) (translation by the author, assisted by Deepl.com).

265. Sinner, *supra* note 263.

266. *Marina Walker Guevara*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/journalists/marina-walker-guevara/> [<https://perma.cc/LPX3-QZK8>] (last visited Jan. 18, 2024).

267. Letter from Marina Walker Guevara to Pierre Gramegna (Oct. 14, 2014), <https://www.slideshare.net/wortlu/icij-brief-gramegna> [<https://perma.cc/HFF2-RTCH>] [hereinafter *Guevara Letter*].

268. *Id.* at 1.

269. *Id.* at 2-3.

270. *Id.* at 2. See also Sinner, *supra* note 263 (“In der ersten von elf Fragen heißt es [the first of eleven questions reads]: ‘Our research shows that over the past 10 years multinational companies from around the world have systemically used Luxembourgs [sic] tax rulings to obtain significant tax advantages in Luxembourg and elsewhere.’”).

271. See *Guevara Letter*, *supra* note 267, at 2.

d'Imposition Sociétés 6 able to thoroughly review and process hundreds of complex tax rulings every year with such a small staff?.”²⁷²

Thus, it seems almost certain that Mr. Gramegna knew about the ICIJ’s investigation before submitting the tax rulings legislation. Although the rulings codification was part of a large package of legislation, it is possible that the Guevara letter affected the timing of submission of the rulings-codification bill.

It nonetheless appears possible that the Luxembourg Ministry of Finance underestimated the effect that the ICIJ’s investigation would have.²⁷³ For example, the Finance Ministry reportedly wrote on November 10, 2014,²⁷⁴ “Fin. Min. was aware of the Consortium’s investigation for a few weeks. We expected publications, but the type of articles published earlier in the year in the FT [*Financial Times*] and the WSJ [*Wall Street Journal*]. We did not know that journalists had more than 500 Rulings and were going to publish them.”²⁷⁵

B. The Content of Luxembourg’s Current Rulings Procedure

As noted above, Luxembourg’s current rulings procedure was part of a lengthy bill termed the “package for the future.”²⁷⁶ The portion on rulings was brief, setting forth new procedures in a few paragraphs in Article 8²⁷⁷ and

272. *Id.* As another example, Question 3 reads, “Can you describe the process companies have to go through to obtain a tax ruling in Luxembourg? Did that process change after Mr. Kohl left his post? If so, how?” *Id.*

273. Minister of Finance Pierre Gramegna stated on November 20, 2014 in response to a parliamentary inquiry, “[n]othing in this letter [from the ICIJ] foreshadowed that journalists had more than 500 rulings that they were going to publish on the internet. With respect to the topics covered, they are of the same nature as those having already been the subject of research by the international press.” *Réponse Commune, supra* note 264, at 2 (original in French). The French goes on to refer to “l’article paru dans le *Financial Times* du 23 juillet 2014, ou celui paru dans le *Wall Street Journal* en date du 21 octobre 2014, dont référence en annexe.” *Id.* The *Wall Street Journal* article is cited above. See Karnitschnig & van Daalen, *supra* note 12. The reference to a *Financial Times* article appears to be to Houlder, *supra* note 68.

274. Sinner, *supra* note 263 (quoting a November 10 letter from the Minister of Finance: “im Schreiben des Finanzministeriums vom 10. November heißt es” meaning “in the Minister of Finance’s November 10 letter, it says”). See also *supra* note 273.

275. Sinner, *supra* note 263 (original in French, reading “Le MinFin était au courant de l’enquête du Consortium depuis quelques semaines. Nous nous attendions à des publications, mais du type des articles parus plus tôt dans l’année dans le FT et le WSJ. Nous ne savions pas que les journalistes disposaient de plus de 500 Rulings et allaient les publier.”) (quoting a November 10 letter from the Minister of Finance).

276. See *supra* note 247 and accompanying text.

277. See *id.* at 46 Ch. 4 Art. 8. The French reads:

1° Il est inséré un paragraphe 29a, libellé comme suit :

« (1) Sur demande écrite et motivée, le préposé du bureau d’imposition émet une décision anticipée relative à l’application de la loi fiscale à une ou plusieurs opérations précises

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including a statement in Article 3 that “[i]n return for the administrative and operating costs of processing requests for information and other benefits, the ACD is authorized to collect from individuals and entities soliciting them fees that can be fixed at up to a maximum of 10,000 euros per request.”²⁷⁸

The final version of the law provided the circumstances in which tax rulings are available and appears to preclude special deals that reduce a taxpayer’s tax liability:

- (1) Upon written and reasoned request, the head of the tax office shall issue an advance ruling on the application of the tax law to one or more specific transactions contemplated by the taxpayer.
- (2) The advance ruling cannot carry exemption or reduction of tax.
- (3) The advance ruling is valid for a period that cannot exceed five tax years. This decision is binding on the ACD for the period referred to above, unless it appears that:
 - (a) the situation or operations described have been incomplete or inaccurate;
 - (b) the situation or the operations subsequently carried out differ from those on which the advance ruling request was based;
 - (c) the advance ruling subsequently turns out not or no longer to be in conformity with the provisions of national law, European Union law or international law.
- (4) Where the application for an advance ruling concerns the taxation of firms, a fee is fixed by the ACD to cover the administrative costs occasioned from time to time for processing the application. This fee varies between 3,000 and 10,000 euros depending on the complexity of the request and the volume of work.
- (5) A Grand-Ducal Regulation determines the procedure applicable to advance rulings and the collection of the fee.²⁷⁹

envisagées par le contribuable ayant pour effet de lier le bureau d'imposition à l'occasion de l'imposition à effectuer ultérieurement.

(2) La décision anticipée permet d'offrir au contribuable par l'interprétation uniforme et égalitaire de la loi fiscale une sécurité juridique par rapport au traitement fiscal d'une ou de plusieurs opérations projetées.

(3) Un règlement grand-ducal détermine la procédure applicable aux décisions anticipées.

2° Le paragraphe 171 est complété par un alinéa 3, libellé comme suit :

« (3) Les dispositions des alinéas 1 et 2 s'appliquent de manière correspondante aux transactions entre entreprises associées. »

Id. The page is numbered 38 but is page 46 of the document.

278. *Id.* at 41 Ch. 1 Art. 3. The original French is as follows: “En contrepartie des frais administratifs et de fonctionnement occasionnés par le traitement de demandes tendant à l’obtention de renseignements et d’autres prestations, l’Administration des contributions directes est autorisée à prélever auprès des personnes et entités les sollicitant des taxes qui peuvent être fixées jusqu’à un maximum de 10.000 euros par demande.” *Id.* The page is numbered 33 but is page 41 of the document.

279. *Supra* note 246 at 5475 Art. 4 (original in French).

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The new, formalized process took effect on January 1, 2015.²⁸⁰ The process newly required payment to the ACD of a fee of up to 10,000 Euros.²⁸¹ The codified law also limits the effectiveness of any tax ruling to five years,²⁸² which is consistent with the duration of certain APAs and “also coincides with the statute of limitation period for the assessment and collection of taxes.”²⁸³

Luxembourg promptly adopted a Grand-Ducal regulation interpreting the law.²⁸⁴ Article 7 of the regulation requires that “advance rulings [be] published in summary and anonymous form in the annual activity report of the [ACD].”²⁸⁵ Each of the ACD’s 2015 through 2022 reports provides statistics on the number of advance ruling requests, APA requests, and the percentages of each that received a favorable or unfavorable ruling.²⁸⁶ The reports also

280. See *supra* note 246 and accompanying text.

281. See *supra* text accompanying notes 278-279 (fee of up to 10,000 Euros); *supra* text accompanying note 83 (previously, the process was free of charge).

282. See *supra* text accompanying note 279 (quoting the law). Prior to codification, rulings did not have a set expiration period. See Chaouche, *supra* note 185, at 3 (“By contrast, the prior regime was silent on the issue of the length of validity of rulings granted by the tax administration.”) (original in French).

283. MARC SCHMITZ & PHILIP J. WARNER, LUXEMBOURG IN INTERNATIONAL TAX PLANNING 397 (3d ed. 2015).

284. Règlement grand-ducal du 23 décembre 2014 relatif à la procédure applicable aux décisions anticipées rendues en matière d’impôts directs et instituant la Commission des décisions anticipées, Art. 7, <http://legilux.public.lu/eli/etat/leg/rgd/2014/12/23/n2/jo> [<https://perma.cc/S6FW-LUAG>] (providing the following dates: “Signature: 22/12/2014”, “Publication 28/12/2014”, and “Entrée en vigueur [effective date]: 31/12/2014”).

285. *Id.* (“Les décisions anticipées sont publiées de manière synthétique et sous forme anonyme dans le rapport d’activité annuel de l’Administration des contributions directes.”); see also Mischo & Kerger, *supra* note 171, at 1200 (“According to article 7 of the regulation, tax rulings will be published under the form of anonymous summaries in the annual report of the Luxembourg tax administration.”).

286. *Annexes du Rapport D’activité du Ministère Des Finances, Exercice 2022*, at 92-96, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2022/minfin-233407-rapport-annuel-2022-annexes-complet.pdf> [<https://perma.cc/KSZ7-HUF8>] [hereinafter *Luxembourg Finance Ministry Report Annexes, 2022*]; *Annexes du Rapport D’activité du Ministère Des Finances, Exercice 2021*, at 76-79, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2021/2021-annexes-mfin.pdf> [<https://perma.cc/WK2J-LRSV>] [hereinafter *Luxembourg Finance Ministry Report Annexes, 2021*]; *Annexes du Rapport D’activité du Ministère Des Finances, Exercice 2020*, at 125-28, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2020/MIN-FIN-ANNEXES-2020.pdf> [<https://perma.cc/54GL-FYBA>] [hereinafter *Luxembourg Finance Ministry Report Annexes, 2020*]; *Annexes du Rapport D’activité du Ministère Des Finances, Exercice 2019*, at 130-33, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2019/2019-annexes-mfin.pdf> [<https://perma.cc/37BC-CLSA>] [hereinafter *Luxembourg Finance Ministry Report Annexes, 2019*]; *Annexes du Rapport D’activité du Ministère Des Finances, Exercice 2018*, at 85-89, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2018-rapport-activite/Rapport-d-activite-2018-du-ministere-des-Finances-Annexes.pdf> [<https://perma.cc/N68J-L46C>] [hereinafter *Luxembourg Finance Ministry Report Annexes, 2018*]; *Annexes du Rapport*
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include a list of the sections of the law at issue and the goal of the ruling.²⁸⁷ However, they do not provide more detailed summaries.²⁸⁸

The Grand-Ducal regulation also “creates a tax ruling commission (commission des décisions anticipées [CDA]), which will deal with tax ruling requests relating to business taxation matters.”²⁸⁹ This commission replaced the process of having a single individual—such as Marius Kohl—consider ruling requests.²⁹⁰ The names of the committee members do not seem to be public.²⁹¹ Bernard Thomas of the *Land* newspaper was only able to report that the head of the Committee is the deputy director of the ACD.²⁹² Mr. Thomas further reported that “Pascale Toussing, the director of the ACD, wrote that

D'activité du Ministère Des Finances, Exercice 2017, at 72-76, <https://impotsdirects.public.lu/dam-assets/fr/profil/rapports/rapport-activite-annexes-2017.pdf> [https://perma.cc/2VC P-KDXR] [hereinafter *Luxembourg Finance Ministry Report Annexes, 2017*]; *Annexes du Rapport D'activité du Ministère Des Finances, Exercice 2016*, at 81-85, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2016-rapport-activite-finances-annexes/2016-rapport-activite-finances-annexes.pdf> [https://perma.cc/GXP9-8BV7] [hereinafter *Luxembourg Finance Ministry Report Annexes, 2016*]; *Annexes du Rapport D'activité du Ministère Des Finances, Exercice 2015*, at 12-14, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2015-rapport-activite-finances-annexes/2015-rapport-activite-finances-annexes.pdf> [https://perma.cc/2NHZ-XPSY] [hereinafter *Luxembourg Finance Ministry Report Annexes, 2015*].

287. For example, the first one listed in 2021 has as its legal basis “Art. 14 L.I.R., art. 175 L.I.R.,” with the goal of “Bénéfice commercial, établissement stable d’un associé non résident d’une SCSp” (“Commercial Profit, Permanent Establishment of a Non-Resident Partner of a Special Limited Partnership”). Luxembourg Finance Ministry Report, 2021, *supra* note 286, at 79.

288. *See id.*

289. Mischo & Kerger, *supra* note 171, at 1198.

290. Tim Fernholz, *How the Tax Wizard of Luxembourg Made Corporate Burdens Disappear*, QUARTZ (Oct. 24, 2014), <https://qz.com/286705/how-the-tax-wizard-of-luxembourg-made-corporate-burdens-disappear/> [https://perma.cc/AEF7-Q3ZU] (Kohl “was replaced by a six-person board that can no longer issue oral rulings as Kohl did.”).

291. *See* Mischo & Kerger, *supra* note 171, at 1198 (“The publication of the composition of the members of the tax ruling commission, which is not known yet, and its procedural and functional rules on the Luxembourg tax administration’s website or by way of an administrative circular would further enhance the transparency of the Luxembourg tax ruling practice.”); Thomas, *supra* note 80 (“In January 2015, the committee adopted internal regulations. This was never published. We therefore do not know almost anything about the functioning of this committee operating at the heart of the ACD: For what period are the members of the rulings commission appointed? What is their rank? ... The identity of the five officials and their two assistants (all appointed by the management of the ACD) is kept secret. Their names are not communicated to the outside.”) (original in French).

292. *Id.* (“Dans son interview avec le Land, le ministre confirme qu’il s’agit de la directrice adjointe de l’ACD, Monique Adams.” Meaning “In his interview with the *Land*, the Minister [of Finance] confirmed that [the president of the Committee] is the deputy director of the ACD, Monique Adams.”).

‘the composition of the rulings Committee is not public so as to let its members work in peace, protected from any external influence.’²⁹³ Thus, the system seems to have been designed to be opaque. Thomas further wrote that “[t]he Committee works like a black box.”²⁹⁴

C. Developments Under Luxembourg’s Current Rulings Regime

Thus, Luxembourg formalized its tax rulings process as of January 1, 2015. The new process reportedly is slower than the process under Mr. Kohl.²⁹⁵ In addition, rulings-exchange processes may apply to rulings requested under this procedure.²⁹⁶ As noted above, Luxembourg also requires that a completed form summarizing the ruling information accompany any tax ruling request.²⁹⁷ This Section discusses the impacts of the new rulings process.

1. Decline in Rulings Volume

Perhaps the most noticeable change since 2015 with respect to Luxembourg tax rulings is that the number of rulings has declined fairly dramatically.²⁹⁸ For example, OECD statistics published at the end of 2020 show the following figures for Luxembourg’s rulings exchanged under BEPS Action 5:

293. Thomas, *supra* note 80 (“Pascale Toussing, la directrice de l’ACD écrit que «la composition de la Commission des décisions anticipées n’est pas publique pour permettre à ses membres de travailler en toute sérénité, à l’abri de toute influence externe éventuelle».”).

294. *Id.* (“La commission fonctionne comme une black-box.”).

295. *See id.* (“En octobre 2013, Marius Kohl est parti à la retraite. Depuis, la machine à produire des rulings s’est enrayée” meaning “In October 2013, Marius Kohl retired. Since then, the machine to produce rulings has jammed.”).

296. Shortly after LuxLeaks, both the European Commission and the OECD required exchanges with other countries of rulings summaries. *See* Mason, *supra* note 161, at 371 n.125. *See also infra* text accompanying note 299 (showing volume of rulings exchanged by Luxembourg under BEPS Action 5 through 2019).

297. *See supra* note 199 and accompanying text.

298. For more about this decline and the limits on what it might signal for other countries, *see* Lederman, *supra* note 39, at 268-69.

Tbl. 2. Luxembourg’s Rulings Exchanged Under the OECD’s BEPS Project²⁹⁹

Time Period	Number of Rulings Exchanged
Jan. 1, 2010 to Mar. 31, 2016	1,922
Apr. 1, 2016 to Dec. 31, 2016	73
2017	18
2018	9
2019	3

Similarly, the European Commission (E.C.)’s Joint Transfer Pricing Forum Statistics show a decline in Luxembourg’s APAs beginning in 2015.³⁰⁰

299. OECD, *Harmful Tax Practices—2019 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5* 252 (2020), <https://www.oecd.org/tax/beps/harmful-tax-practices-2019-peer-review-reports-on-the-exchange-of-information-on-tax-rulings-afd1bf8c-en.htm> [<https://perma.cc/ML82-NTR4>] [hereinafter OECD, 2020]; the 2017 OECD report lists the number of past rulings as 5,600. See OECD, 2017, *supra* note 48, at 189.

300. EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APA’S (ADVANCE PRICING AGREEMENTS) IN THE EU AT THE END OF 2022 (2023), https://taxation-customs.ec.europa.eu/document/download/d96e1bc2-a820-45d6-b26d-187514bffdde_en?filename=APAs_2022_FINAL.pdf [<https://perma.cc/YRY5-Y5ZU>] [hereinafter EC, 2022 APAs]; EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APA’S (ADVANCE PRICING AGREEMENTS) IN THE EU AT THE END OF 2021 1 (2023) (Luxembourg noted that “[g]iven that a unilateral APA may cover EU and NON-EU transactions at the same time, the split EU and NON-EU is only made for bilateral APAs”), https://taxation-customs.ec.europa.eu/system/files/2023-08/20230816_APA_consolidated_2021%20template.pdf [<https://perma.cc/XW5W-BCXE>]; EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APA’S (ADVANCE PRICING AGREEMENTS) IN THE EU AT THE END OF 2020 4 (2022), https://ec.europa.eu/taxation_customs/system/files/2022-02/APAs_2020_FINAL.pdf [<https://perma.cc/AXT5-3DZY>] [hereinafter EC, 2020 APAs]; EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APAS IN THE EU AT THE END OF 2019 4 (2021), https://taxation-customs.ec.europa.eu/system/files/2021-04/apas_2019.docx.pdf [<https://perma.cc/DVK5-NABC>]; EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APAS IN THE EU AT THE END OF 2018 3 (2019), https://taxation-customs.ec.europa.eu/system/files/2023-09/APAs_2018_FINAL.pdf [<https://perma.cc/2RQ5-UW6G>]; EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APAS IN THE EU AT THE END OF 2017 4 (2018), https://taxation-customs.ec.europa.eu/system/files/2018-10/statistics_on_advance_pricing_agreements_2017_en.pdf [<https://perma.cc/K7H2-566J>]; EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APAS IN THE EU AT THE END OF 2016 3 (2017), https://taxation-customs.ec.europa.eu/system/files/2018-03/2016_jptf_apa_statistics_en.pdf [<https://perma.cc/3S6U-RXME>]; EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APAS IN THE EU AT THE END OF 2015 2 (2016), <https://taxation-customs.ec.europa.eu/system/files/2016-12/jtpf0152016enapastatistics.pdf> [<https://perma.cc/AUT5-PGRC>]; EUROPEAN COMM’N, EU JOINT TRANSFER PRICING FORUM: STATISTICS ON APAS IN THE EU AT THE END OF 2014 2 (2015), <https://taxation-customs.ec.europa.eu/system/files/2016-09/jtpf0092015apastatistics2014.pdf> [<https://perma.cc/6AJ8-YRBS>]; EUROPEAN COMM’N, EU JOINT

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Tbl. 3. E.C. Statistics on Luxembourg's E.U. APAs³⁰¹

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total Requests	107	204	398	163	37	3	19	11	8	19	4
Granted	2	117	228	145	91	1	6	3	6	3	–
Rejected	0	0	10	41	25	0	3	1	2	1	2
Withdrawn	0	2	50	28	19	0	3	2	0	–	–

Thus, 2014 was the high point for Luxembourg's APA volume, and requests dropped significantly in both 2015 and 2016. In fact, requests in 2019 for a Luxembourg APA were less than 3% of the volume of such requests only five years earlier! Essentially, Luxembourg's APA practice began to dry up after 2015. This timing corresponds both to the LuxLeaks revelations and to the formalization of Luxembourg's tax-rulings process. Both of those events made Luxembourg tax rulings more visible.

It is also important to observe that, as the table above on Luxembourg's E.U. APA's reflects, beginning in 2015 and continuing through 2020, Luxembourg rejected an increasing percentage of ruling requests. The increased rejection rate removed some of the attractiveness and certainty of the previous regime.

While the figures above show that Luxembourg rejected no APA requests in 2012 and 2013 and only 10 out of 398 in 2014, more recent figures are very different. As shown in the table below, in 2019, Luxembourg reported figures showing that it rejected a quarter of letter ruling requests and a supermajority of APAs; in 2020, it rejected almost 62% of letter ruling requests and the sole APA listed for that year.

TRANSFER PRICING FORUM: STATISTICS ON APAS AT THE END OF 2013 2 (2014), https://taxation-customs.ec.europa.eu/system/files/2016-09/jtpf_007_2014_en.pdf [<https://perma.cc/DDZ8-2LEY>]; EUROPEAN COMM'N, EU JOINT TRANSFER FORUM: STATISTICS ON APAS AT THE END OF 2012 2 (2013), https://taxation-customs.ec.europa.eu/system/files/2022-03/jtpf_013_2013_en_on%20webpage_0.pdf [<https://perma.cc/WXD9-Q4VY>].

301. Only E.U. APAs are reported in this chart because 2013 does not contain a figure for non-E.U. APAs. In the other years in the chart, the figures are the same for E.U. and total APAs, except in two instances. In 2020, Luxembourg received 1 non-E.U. APA request and it seems the taxpayer withdrew it. EC, *2020 APAs*, *supra* note 300, at 4 (listing 1 withdrawn non-E.U. APA for that year). Luxembourg received 3 non-E.U. requests in 2022. EC, *2022 APAs*, *supra* note 300, at 4.

The "Granted," "Denied," and "Withdrawn" figures do not add up to the "Requests" figure for the year because APAs are not generally disposed of during the same year as the request. For example, for 2018, Luxembourg reported an average time of 24 months to negotiate a bilateral or multilateral APA. *EU Joint Transfer Pricing Forum Statistics on APAs at the End of 2018*, at 3 (July 2019), https://taxation-customs.ec.europa.eu/system/files/2023-09/APAs_2018_FINAL.pdf [<https://perma.cc/WCT9-Y9TS>].

Tbl. 4. Luxembourg Statistics on Letter Rulings & APAs, 2015-2021³⁰²

	Letter Rulings								APAs							
	2015	2016	2017	2018	2019	2020	2021	2022	2015	2016	2017	2018	2019	2020	2021	2022
Favorable	454	390	204	114	69	44	56	46	145	91	18	3	1	0	2	0
Unfavorable	85	62	27	28	23	27	25	20	42	27	11	3	2	1	1	1
Total	539	452	231	142	92	71	81	66	187	118	29	6	3	1	3	1
Percent Unfavorable (%)	15.8	13.7	11.7	19.7	25.0	62.0	30.9	30.3	22.5	22.9	37.9	50.0	66.7	100	33.3	100

Thus, Luxembourg’s changes to its tax-rulings process and increased percentage of unfavorable outcomes correspond in time with a decline in rulings volume. It is likely that the formalization, increased cost, and increasing percentage of unfavorable rulings deterred rulings requests. However, that does not necessarily mean that Luxembourg’s actions were the sole cause of the decline in rulings volume. Around the same time Luxembourg’s new rulings regime took effect, the E.U. made several important changes.

In part, the E.U. increased transparency. First, in December 2015, the E.U. adopted Directive 2015/2376/EU, relating to “mandatory automatic exchange of information in the field of taxation.”³⁰³ This Directive requires E.U. countries to automatically exchange information on tax rulings, resulting in somewhat greater transparency.³⁰⁴ Second, in 2018, the E.U. adopted an

302. *Luxembourg Finance Ministry Report Annexes, 2022*, *supra* note 286, at 92; *Luxembourg Finance Ministry Report Annexes, 2021*, *supra* note 286, at 76; *Luxembourg Finance Ministry Report Annexes, 2020*, *supra* note 286, at 125; *Luxembourg Finance Ministry Report Annexes, 2019*, *supra* note 286, at 130; *Luxembourg Finance Ministry Report Annexes, 2018*, *supra* note 286, at 85; *Luxembourg Finance Ministry Report Annexes, 2017*, *supra* note 286, at 72; *Luxembourg Finance Ministry Report Annexes, 2016*, *supra* note 286, at 81; *Luxembourg Finance Ministry Report Annexes, 2015*, *supra* note 286, at 12. Luxembourg’s tax administration did not publish similar figures in earlier years. *See, e.g.,* GOUVERNEMENT.LU, *Annexes au rapport d’activité du Ministère Des Finances, Exercise 2014*, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2014-rapport-activite-finances-annexes/2014-rapport-activite-finances-annexes.pdf> [<https://perma.cc/FB6B-Q6X7>]; GOUVERNEMENT.LU, *Rapport d’activité du Ministère des Finances, Exercise 2014*, <https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2014-rapport-activite-finances/2014-rapport-activite-finances.pdf> [<https://perma.cc/M36C-MT8V>].

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

303. Council Directive, *supra* note 240.

304. *See* Lederman, *supra* note 39, at 255 (noting that the Directive does not require exchange of the full text of a ruling, but that “Member States can also request the full text”).

information-exchange Directive³⁰⁵ known as DAC 6,³⁰⁶ which imposes transparency requirements on intermediaries such as tax advisers and banks, relating to certain cross-border tax strategies.³⁰⁷ DAC 6 not only requires disclosure to the tax authority of an intermediary's home country of aggressive tax strategies, it also requires automatic exchange of information about these strategies.³⁰⁸

These transparency changes by the E.U. could have decreased the demand for tax rulings. However, to the extent these changes in E.U. law dampened taxpayers' or tax authorities' appetite for tax rulings, we might expect to see that effect on E.U. countries other than Luxembourg, too, at least insofar as those rulings had accomplished profit-shifting. OECD data provides a helpful window on this because it provides statistics for numerous European countries on the number of tax rulings subject to exchange under its rules across several periods: (1) a pre-April 2016 set of years, (2) most of 2016,³⁰⁹ and (3) each year from 2017 to 2020.

Figure 1 shows the OECD data on tax-rulings trends in Luxembourg,³¹⁰ in countries in the E.U. other than Luxembourg,³¹¹ and countries in non-E.U.

305. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0822&from=EN> [<https://perma.cc/GT5H-7N29>].

306. Werner Haslehner & Katerina Pantazatou, *Assessment of Recent Anti-Tax Avoidance and Evasion Measures (ATAD & DAC 6)*, EUR. PARL. 29 (Mar. 2022), [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703353/IPOL_STU\(2022\)703353_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703353/IPOL_STU(2022)703353_EN.pdf) [<https://perma.cc/45JK-Y66T>].

307. *Id.*

308. *Id.*

309. The time period the OECD uses for 2016 is April 1 to December 31. Because this is a 9-month period and the other periods are each 1 year, the chart grosses up the 9-month figure by one-third, to get an approximate annualized figure for 2016.

310. The OECD data in the Figures, including Luxembourg's rulings numbers, generally come from the OECD's 2021 report. See OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, *Harmful Tax Practices—2020 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5* (2021) [hereinafter OECD, 2021], <https://www.oecd.org/tax/beps/harmful-tax-practices-2020-peer-review-reports-on-the-exchange-of-information-on-tax-rulings-f376127b-en.htm> [<https://perma.cc/C5P8-2SUZ>], at 283. Some of the numbers for previous years are different in earlier reports. See, e.g., OECD, 2018, *supra* note 55, at 328 (stating that the Netherlands issued 2,198 past rulings for the applicable period, not 2,204, and that it issued 213 rulings for 2017, not 214), 344 (stating that Norway issued no rulings in 2017, not 1).

Average and annualized figures in the charts are rounded to the nearest whole number. The "past rulings" figure there is divided by 6.25 to get an annual average.

311. The European Union countries other than Luxembourg in the 2021 OECD data include Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Nether-

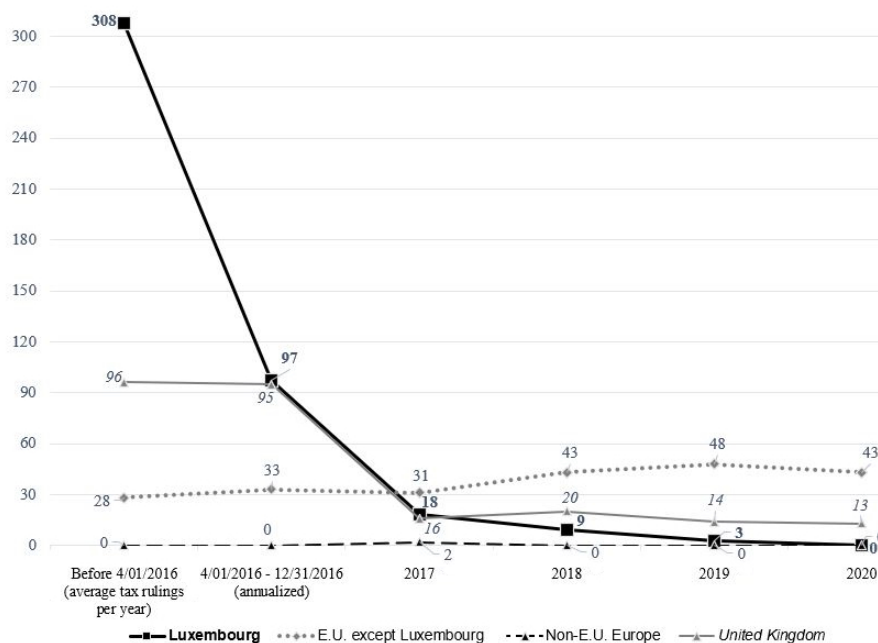
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Europe.³¹² Note that because the United Kingdom (U.K.) left the European Union part way through the time period in question, it is included separately.³¹³ Figure 1 also only includes those countries that have the same “past rulings” period as Luxembourg, in order to make a direct year-by-year comparison.³¹⁴ Data on a larger group of countries appear below.³¹⁵

lands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, and Sweden. EUROPEAN UNION, *Country Profiles*, https://european-union.europa.eu/principles-countries-history/country-profiles_en [<https://perma.cc/AW9U-4VZT>] [herein-after *Country Profiles*] (last visited Jan. 18, 2024). In addition, “[t]hirteen Overseas Countries and Territories (OCTs) are associated with the European Union. . . . As of 1 February 2020, they are: . . . linked to Netherlands: Aruba, . . . Curaçao, . . . Sint Maarten. . . .” EUROPEAN COMM’N, *Overseas Countries and Territories*, https://international-partnerships.ec.europa.eu/countries/overseas-countries-and-territories_en [<https://perma.cc/N6AA-JY4P>] (last visited Jan. 29, 2024). However, the Article omits from the calculations in the figures the following countries and territories because they did not have the same “past rulings” time period: Aruba, Croatia, Curaçao, Lithuania, Malta, Romania, and Sint Maarten. *See id.* at 49, 123, 126, 279, 294, 349, 380.

312. The countries included in the 2021 OECD data that this Article categorized as non-E.U. Europe and that have the same past-rulings time period as Luxembourg, *see infra* Appendix (tbl. 5), are the non-E.U. countries included in the Figure 1 data. Those countries are Iceland, Norway, Russia, and Turkey. *See* CIA.GOV, *The World Factbook, World and Regional Maps*, <https://www.cia.gov/the-world-factbook/maps/world-regional/> [<https://perma.cc/H9WV-9GM7>] (last visited Jan. 29, 2024) (linking Political Europe map, https://www.cia.gov/the-world-factbook/static/cd0ba07f4edc52b9f8e10b9992267c52/europe_pol-1.pdf [<https://perma.cc/DCL9-6DB5>]); *cf.* EUROPEAN UNION, *Country Profiles*, *supra* note 311 (listing E.U. countries).
313. The U.K. left the European Union on January 31, 2020, and that began a transition period that lasted the rest of 2020. EUROPEAN UNION, *Brexit: EU-UK relationship* (Apr. 30, 2021), <https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html> [<https://perma.cc/C5M8-7JEA>].
314. The European countries included in Figures 1 and 4 are those for which the “past rulings” period is “(i) on or after 1 January 2014 but before 1 April 2016; or (ii) on or after 1 January 2010 but before 1 January 2014, provided they were still in effect as at 1 January 2014”. OECD, 2021, *supra* note 310, at 57, 65, 131, 140, 154, 167, 171, 184, 193, 208, 213, 225, 238, 271, 315, 325, 337, 341, 354, 384, 388, 394, 402, 418. The following non-E.U. countries were omitted from the calculations in Figures 1 and 4 because they did not have the same “past rulings” time period: Faroe Islands, Georgia, Guernsey, Isle of Man, Jersey, Liechtenstein, San Marino, Switzerland, and Ukraine. *See* OECD, 2021, *supra* note 310, at 162, 180, 200, 229, 251, 275, 364, 407, 422. (“Georgia views itself as part of Europe; geopolitically, it can be classified as falling within Europe, the Middle East, or both.” CIA.GOV, *The World Factbook, Georgia*, <https://www.cia.gov/the-worldfactbook/countries/georgia/> [<https://perma.cc/8E93-75F7>] (last visited Jan. 29, 2024)).
315. *See infra* text accompanying note 318 (fig. 2). In addition, raw OECD data on more countries with the same “past rulings” period as Luxembourg, but spanning various geographic regions, appears in Table 5, *infra* Appendix.

Fig. 1. OECD Tax-Rulings Data: Luxembourg vs. E.U. Except Luxembourg (Select Countries), Non-E.U. Europe (Select Countries), and U.K.



This look at OECD data allows visualization of the rulings trends in non-E.U. European countries as a sort of “control” for the effect of E.U. regulation, and visualization of both groups as something of a control for the effects of Luxembourg-specific regulation. Figure 1 shows that the rulings exchanged by E.U. countries and non-E.U. European countries both stayed fairly flat across the period in question. The U.K., which Figure 1 includes separately, was also flat, except for a sharp drop from 2016 to 2017, a time period that is discussed briefly below. By contrast, Luxembourg rulings plummeted in 2016 (the year after its new tax-rulings regime began), fell sharply again in 2017, dropped below the other E.U. and non-E.U. countries in 2018, and continued dropping, falling to zero in 2020. This is a very idiosyncratic pattern.

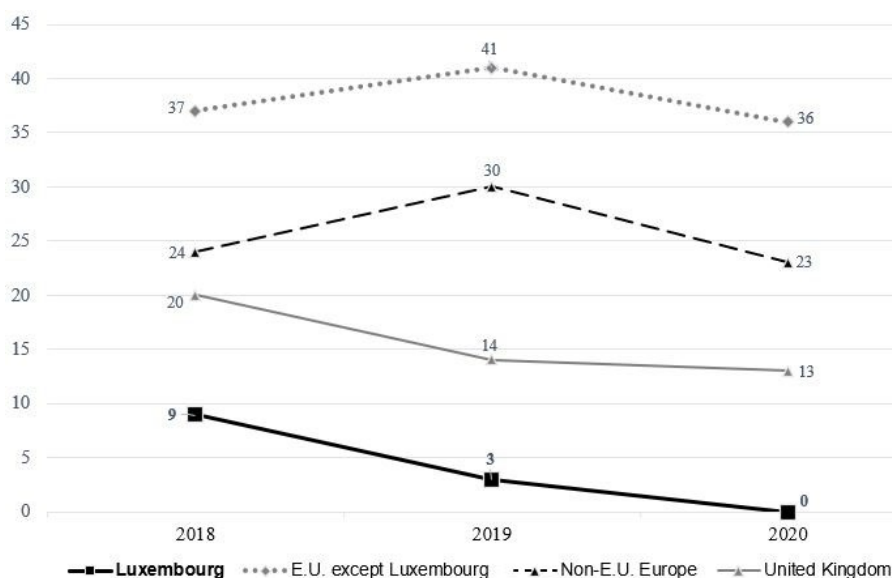
Figure 1 only includes in the E.U. and non-E.U. groups countries with the same “past rulings” period as Luxembourg.³¹⁶ That excludes several countries. For comparison purposes, Figure 2 includes all OECD countries in the E.U. and almost all countries in non-E.U. Europe.³¹⁷ However, for some countries in

316. See *supra* text accompanying note 314.

317. With respect to non-E.U. Europe, the following countries are not included because their past-rulings periods extend into 2018: Faroe Islands, Georgia, and Ukraine. See OECD, 2021, *supra* note 310, at 163, 181, 423. In addition, Georgia and Ukraine “issued
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this larger group, the average-past-rulings-per-year cannot be calculated because the country’s past-rulings period does not have a starting date. In addition, including some countries causes comparison issues with certain years because, for some countries, the past-rulings period extends into 2016 or 2017. To address these issues, Figure 2 only includes 2018 through 2020. This Figure, too, shows how idiosyncratic Luxembourg’s decline to zero rulings over the period in question is.

Fig. 2. OECD Tax-Rulings Data: Luxembourg vs. E.U. Except Luxembourg, Non-E.U. Europe, and U.K.³¹⁸

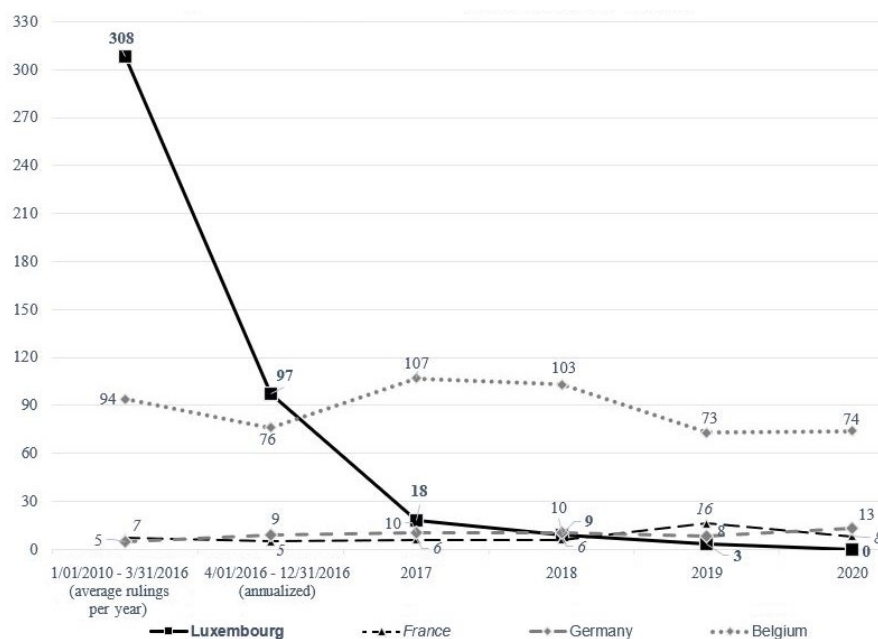


Luxembourg’s rulings decline also differs from specific countries that might be logical comparators. For example, Luxembourg’s pattern also remains distinct when Luxembourg is compared to its surrounding countries—Belgium, France, and Germany. Those latter three countries’ rulings volume each stayed fairly flat, as shown in Figure 3.

no rulings within the scope of the transparency framework.” *Id.* at 180, 422. Therefore, the non-E.U. European countries reflected in this Figure are Guernsey, Iceland, Isle of Man, Jersey, Lichtenstein, Norway, Russia, San Merino, Switzerland, and Turkey.

318. For the data for the additional E.U. countries in Figure 2, see *id.* at 123, 126, 279, 294, 349. For the data for the additional non-E.U. European countries, see *id.* at 200, 229, 251, 275, 364, 407.

Fig. 3. OECD Tax-Rulings Data: Luxembourg vs. Belgium, France, and Germany



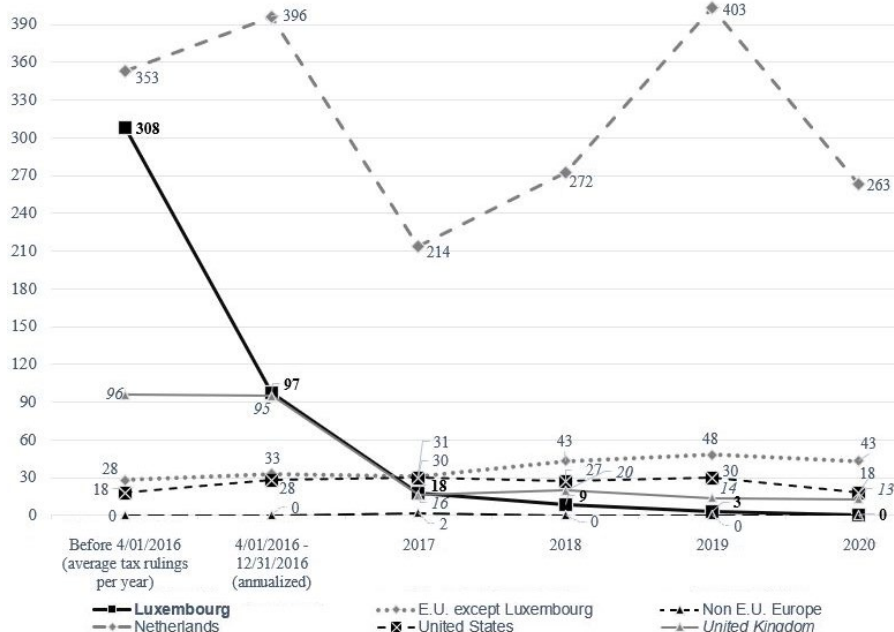
Luxembourg also differs from other countries with an above-average initial number of tax rulings. Figures 1 and 3 show how it differs from the U.K. and Belgium. Belgium, which started with a rulings volume similar to that of the U.K., actually saw its rulings increase from 2016 to 2017, as shown in Figure 3.

The only country in the OECD data that started with a volume of past rulings as high or higher than Luxembourg is the Netherlands.³¹⁹ The Netherlands is also a good comparator because Luxembourg's rulings practice was highly influenced by the Netherlands' approach, as discussed in Part I. If E.U. rulings transparency changes were a major driver of a decrease in Luxembourg tax rulings, we might expect to see a similar pattern in the Netherlands. However, Luxembourg's pattern is quite different from the Netherlands', as shown in Figure 4.³²⁰ The Netherlands actually saw 2019 rulings rise to above its historic levels—a sharp contrast to Luxembourg's drop to a mere 3 rulings exchanged in that year.

319. See *id.* Also, the table in Appendix, *infra*, shows the data for numerous other OECD countries (European and otherwise).

320. Figure 4 also includes the United States as a comparator. Its pattern is also flat, and its numbers fall between the E.U. and non-E.U. Europe figures. The U.K. is not included in either grouping of European countries. See *supra* note 313 and accompanying text.

Fig. 4. OECD Tax-Rulings Data: Luxembourg vs. E.U. Except Luxembourg, Non-E.U. Europe, Netherlands, U.S., and U.K.



Figures 1 through 4 therefore show an idiosyncratic decline in tax rulings volume in Luxembourg beginning in 2016. Of course, that does not necessarily mean that Luxembourg’s internal changes were the cause, or the sole cause of the decline. E.U. changes that disproportionately affected Luxembourg could also be a factor. In addition to its transparency measures, the E.U. also implemented substantive anti-tax-avoidance measures. In 2016, the E.U. adopted an Anti-Tax Avoidance Directive (ATAD), which required all E.U. countries to incorporate certain anti-tax avoidance rules into their domestic laws by January 1, 2019.³²¹ That Directive is known as ATAD 1. One of the five provisions focused on anti-hybrid rules, but it was not complete at that point.³²² In 2017, ATAD 2, which was primarily inspired by BEPS Action 2,³²³ amended ATAD 1 to address “hybrid mismatch[es].”³²⁴

321. Haslehner & Pantazatou, *supra* note 306, at 10 (“The Anti-Tax Avoidance Directive (EU 2016/1164) came into force in August 2016....”).

322. Bart Peeters & Lars Vanneste, *The Hybrid Financial Instruments: The Effects of the OECD BEPS Action 2 Report and the ATAD*, 48 *INTERTAX* 14, 15 (2020).

323. *Id.* For BEPS Action 2, see OECD, *supra* note 77.

324. Marian, *supra* note 2, at 49.

Hybrid mismatches use debt/equity arbitrage³²⁵ to achieve double nontaxation.³²⁶ ATAD 2's anti-hybrid rules encompass these hybrid instruments.³²⁷ Many Luxembourg tax rulings used debt/equity arbitrage³²⁸ so as to zero out tax liability on the funds passing through Luxembourg, other than the tiny margin Luxembourg taxed.³²⁹ Adoption of anti-hybrid rules would mean "that if Luxembourg classifies an instrument as 'debt,' any EU recipient would have to classify payment from the instrument as 'interest' and, as such, include the payment in income of the recipient,"³³⁰ ending the tax benefits. Luxembourg implemented the anti-hybrid rules in the ATAD as of January 1, 2019.³³¹ This substantive change likely eliminated a major reason for getting a Luxembourg tax ruling. Of course, the same would be true for any country using tax rulings to produce hybrid mismatches. However, most other countries did not have anything close to Luxembourg's rulings volume, suggesting, at a minimum, that they were not using rulings to create hybrid mismatches in bulk.

Another E.U. change that disproportionately affected Luxembourg began when, in 2014 and 2015, the E.C. began to investigate whether tax rulings granted by various countries³³² constituted "State Aid" that is prohibited as a matter of competition law.³³³ Despite the relatively small number of rulings-

325. *Id.*

326. *See supra* note 77 and accompanying text.

327. Marian, *supra* note 2, at 49.

328. *Id.* at 29 (finding in a sample of the LuxLeaks rulings that "the most common substantive rulings sought by taxpayers in their submissions concern the building blocks of intermediary financing arrangements in which debt-to-equity arbitrage is the primary component.").

329. *Id.* ("Why would Luxembourg agree to help taxpayers eliminate tax liability in other jurisdictions, while at the same time allowing them to completely strip their income tax liability in Luxembourg ...? The answer, of course, is that Luxembourg charges a fee. The fee comes in the form of a margin that is determined in the ATA.").

330. *Id.* at 49-50.

331. EY.com, *Luxembourg implements EU ATAD 2 – A detailed review* (Jan. 14, 2020), <https://taxnews.ey.com/news/2020-0085-luxembourg-implements-eu-atad-2-a-detailed-review> [<https://perma.cc/G46N-3X7H>].

332. *See* Nicolaidis, *supra* note 160, at 416.

333. "State aid is defined as an advantage in any form whatsoever conferred by national public authorities to undertakings on a selective basis." EUROPEAN COMM'N, *State Aid Overview*, https://competition-policy.ec.europa.eu/state-aid/state-aid-overview_en [<https://perma.cc/PQ49-6DFP>] (last visited Jan. 18, 2024). Article 107 of the Treaty on the Functioning of the European Union prohibits state aid:

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

Consolidated Version of the Treaty on the Functioning of the European Union art. 107, June 7, 2016, 2016 O.J. (C202) 91, <https://eur-lex.europa.eu/resource.html?uri=>

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related State Aid cases the E.C. pursued, its intention may have been to send a message discouraging the use of tax rulings, as Robert Goulder has argued:

Countries like Ireland, Luxembourg, and the Netherlands issued thousands of these advance rulings over recent decades... [Margrethe] Vestager's directorate can only address a handful of cases per year, meaning it could take a century or more to run through the full inventory of potentially illegal tax arrangements. Clearly her purpose is to send a message. Going forward, those member states that have historically relied on advance rulings need to find more legitimate ways to lure foreign capital to their shores.³³⁴

It is therefore worth examining the early chronology of the E.C.'s tax-rulings-related State Aid investigations to see how Luxembourg was affected and compare that to other countries.

On June 11, 2014, the E.C. opened the first set of these cases, with one each focused on Luxembourg, the Netherlands, and Ireland.³³⁵ On October 7, 2014, it opened another case involving Luxembourg.³³⁶ In December 2014, the E.C. asked all E.U. member States if they offer tax rulings, and, if so, for "a list of all companies that have received a tax ruling from 2010 to 2013."³³⁷ In 2015, the E.C. opened a State Aid investigation into Belgium's entire "excess profits" rulings scheme.³³⁸ In that year, the E.C. also opened another case involving Luxembourg.³³⁹ In subsequent years, the E.C. opened additional investigations into Luxembourg and the Netherlands, as well as one with respect to the U.K.³⁴⁰ The E.C. subsequently followed up on the excess-

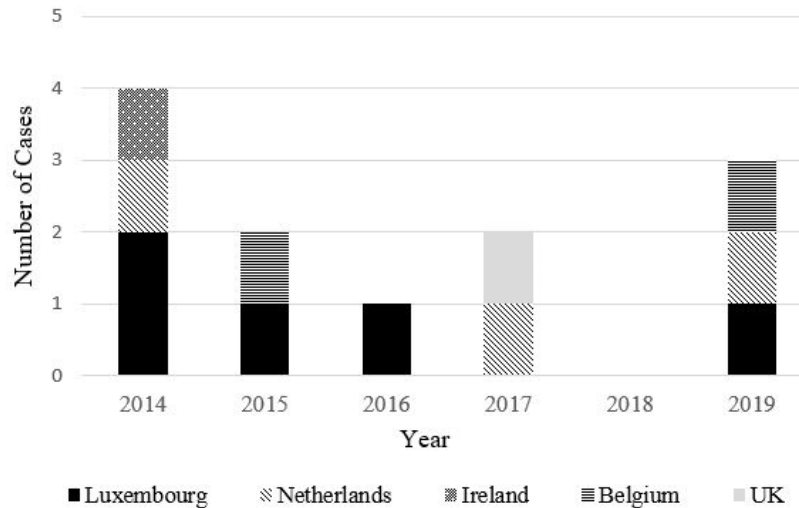
cellar:9e8d52e1-2c70-11e6-b497-01aa75ed71a1.0006.01/DOC_3&format=PDF
[<https://perma.cc/VS3B-HC6L>].

334. Robert Goulder, *Why the EU Needs FOIA for Tax Administration*, 94 TAX NOTES INT'L 1141, 1142-43 (June 10, 2019). Margrethe Vestager is "the EU Competition Commissioner." *Id.* at 1142.
335. Richard Lyal, *Transfer Pricing Rules and State Aid*, 38 FORDHAM INT'L L.J. 1017, 1017 (2015) (the Luxembourg case involved Fiat, the Netherlands case involved Starbucks, and the Ireland case involved Apple).
336. *Id.* (Luxembourg case involving Amazon).
337. EUROPEAN COMM'N, *State Aid: Commission Extends Information Enquiry on Tax Rulings Practice to All Member States* (Dec. 17, 2014), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_2742 [<https://perma.cc/ZE79-AVDD>].
338. EUROPEAN COMM'N, *State Aid: Commission Concludes Belgian "Excess Profit" Tax Scheme Illegal; Around €700 million to be Recovered from 35 Multinational Companies* (Jan. 11, 2016), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_42 [<https://perma.cc/HJ6N-D3YB>] (case involving Belgium opened in February 2015).
339. EUROPEAN COMM'N, *State Aid: Commission Opens Formal Investigation into Luxembourg's Tax Treatment of McDonald's* (Dec. 3, 2015), https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6221 [<https://perma.cc/S8KB-PNUS>] (case involving McDonald's opened in December 2015).
340. EUROPEAN COMM'N, *State Aid: Commission Opens In-Depth Investigation Into Luxembourg's Tax Treatment of GDF Suez (now Engie)* (Sept. 16, 2016), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3085 [<https://perma.cc/7QAQ-UXQG>] (case
footnote continued on next page)

profits rulings in Belgium by opening separate investigations into thirty-nine companies.³⁴¹

As this description suggests, Luxembourg was an early and frequent focus of the E.U.'s rulings-related State Aid investigations. Figure 5 depicts the number of these cases per year, showing the relative proportion and timing of cases involving Luxembourg:³⁴²

Fig. 5. E.U. State Aid Investigations Opened Involving Tax Rulings (2014-2019)



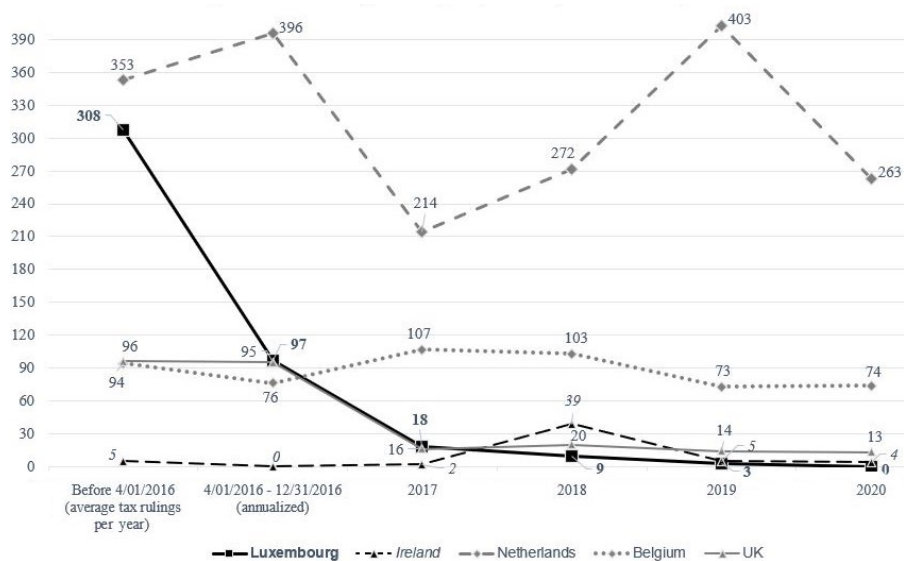
involving Engie opened in September 2016); EUROPEAN COMM'N, *State Aid: Commission Opens In-Depth Investigation Into UK Tax Scheme for Multinationals* (Oct. 26, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_4201 [<https://perma.cc/5U92-2RP8>] (case involving UK's Controlled Foreign Company (CFC) regime opened in October 2017); EUROPEAN COMM'N, *State Aid: Commission Opens In-Depth Investigation Into the Netherlands' Tax Treatment of Inter IKEA* (Dec. 18, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5343 [<https://perma.cc/S6RQ-RYN3>] (case involving IKEA opened in December 2017); EUROPEAN COMM'N, *State Aid: Commission Opens In-depth Investigation Into Tax Treatment of Nike in the Netherlands* (Jan. 10, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_322 [<https://perma.cc/J7P7-8684>] (case involving Nike opened in January 2019); EUROPEAN COMM'N, *State Aid: Commission Opens In-Depth Investigation Into Tax Treatment of Huhtamäki in Luxembourg* (Mar. 7, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1591 [<https://perma.cc/EL3B-J6MY>] (case involving Huhtamäki opened in March 2019).

341. EUROPEAN COMM'N, *State Aid: Commission Opens In-Depth Investigations into Individual "Excess Profit" Tax Rulings Granted by Belgium to 39 Multinational Companies* (Sept. 16, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5578 [<https://perma.cc/5REN-8PAM>].

342. See EUROPEAN COMM'N, *supra* note 338; *supra* notes 335-341 (naming the cases and countries involved).

The E.C.’s rulings-related investigations thus focused on five countries: Belgium, Ireland, the U.K., the Netherlands, and Luxembourg—but Luxembourg experienced the most such cases, as Figure 5 shows. The number of rulings exchanged by those countries under OECD rules appears below, in Figure 6.³⁴³ Ireland, which is the only country that doesn’t appear in any of the first four Figures above, had relatively few rulings subject to exchange under OECD rules,³⁴⁴ and its rulings exchanged actually rose between 2017 and 2018, as the dark, dashed line in Figure 6 shows. Once again, Luxembourg’s pattern of plummeting rulings volume remains idiosyncratic.

Fig. 6. OECD Tax-Rulings Data: Luxembourg vs. Belgium, Ireland, Netherlands, and U.K.



While every country is different, and some countries have a history of much greater use of tax rulings than others do, the comparative Figures above suggest that events that disproportionately affected Luxembourg depressed its rulings volume as early as 2016. Figure 4 does show that the Netherlands, the U.K., and Luxembourg all saw substantial drops between 2016 and 2017 in the number of rulings exchanged. This does not appear to be a greater-E.U. or European pattern, as the quantities of rulings for those groups of countries stayed fairly flat. But of the three countries that experienced this drop between 2016 and 2017, Luxembourg was the only one that also had a large drop from

343. See OECD, 2021, *supra* note 310, at 65, 225, 283, 315.

344. See *infra* Appendix (showing, in Table 5, the number of rulings exchanged per year by Ireland and various other countries).

pre-2016 years to 2016. The Netherlands actually saw an increase in rulings in that time, and the U.K. stayed basically flat.

During the 2015 to 2020 period, efforts by several different actors created pressures that may have decreased multinational companies' demand for tax rulings in the E.U. generally or in Luxembourg in particular. In that sense, the steep drop to 0 Luxembourg rulings in the OECD's 2020 rulings-exchange data is overdetermined. However, the idiosyncratic, precipitous drop that Luxembourg experienced in its rulings volume from pre-2016 years to 2016 cannot easily be explained by most E.U. events. That includes the ATAD's anti-hybrid rules, which Luxembourg did not implement until January 1, 2019. The 2015 Luxembourg-specific changes, which made its rulings process formal, slower, and more costly, are likely at least a partial explanation.

It is also possible that State Aid investigations played a role. The E.C.'s early State Aid investigations were in 2014 and 2015. Although the E.C. opened rulings-related State Aid investigations into four different countries, and multiple such investigations against more than just Luxembourg, Luxembourg was the only country against which the E.C. opened multiple rulings-related State Aid investigations through 2016. In addition, because LuxLeaks was an apparent trigger for the E.C.'s initial investigations³⁴⁵ and LuxLeaks publicly revealed the content of so many Luxembourg tax rulings, tax experts may have anticipated the possibility of many more Luxembourg-focused investigations. It is certainly possible that this depressed the volume of Luxembourg tax rulings. The State Aid investigations also could have indirectly affected that volume if they were a factor in Luxembourg changing its rulings process or in changing that process when it did.³⁴⁶

2. What, If Anything, Replaced Luxembourg Ruling Requests?

The tables and figures above show that requests for Luxembourg tax rulings declined steadily and substantially starting in 2015. That raises the question of what, if anything, took their place. Of course, it is possible that the decline in rulings volume is temporary. In 2020, when the Luxembourg legislature prospectively revoked the rulings issued before 2015,³⁴⁷ it publicized the option of reapplying for those rulings. Fatima Chaouche explains:

345. Richard, *supra* note 37, at 8.

346. The E.C. opened the Fiat investigation on June 11, 2014. *See supra* text accompanying note 335; *supra* text accompanying note 342 (fig. 5). The draft of Luxembourg's new rulings system reportedly was written in the summer of 2014. *See supra* note 249 and accompanying text. The E.C. opened the Amazon investigation on October 7, 2014. Lyal, *supra* note 335, at 1017. Luxembourg's Minister of Finance submitted the legislation to Parliament on October 15, 2014. *See supra* text accompanying note 248.

347. *See supra* note 189 and accompanying text.

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[T]he announcement of this legislative change has been the subject of a string of tax alerts and newsletters from local firms calling those who it may concern to approach their “experts” with a view to submitting a new request for a ruling. The tax administration even took care to publish a press release in December 2019 anticipating the adoption of [this law]. In it, it announced the terms of the new procedure and the availability of the rulings commission for inquiries.³⁴⁸

And, in 2021, Luxembourg reported a slightly increased year-over-year rulings volume for the first time in several years, and a decrease in the percentage of unfavorable rulings, as well.³⁴⁹

Regardless of whether rulings volume increases going forward, it is possible that taxpayers increased their use of other forms of guidance as rulings volume declined. Perhaps anticipating a decline in rulings requests, or concern about the new fee for rulings, the Luxembourg tax administration stated when it formalized its rulings process in 2015 that it would increase its published tax Circulars, to reduce the need for rulings.³⁵⁰ Luxembourg lists numerous tax Circulars online.³⁵¹

In conjunction with published guidance, taxpayers may rely on the advice of tax experts, such as a tax opinion.³⁵² It is also possible that some taxpayers turned to information letters, as described in the LuxLetters investigation. Although a procedure that depends on an informal understanding lacks the written support of the tax administration that a ruling has, it should have no less authority than a tax opinion.³⁵³

Of course, another possibility is that companies simply shifted to more frequent use of countries other than Luxembourg. If the volume of funds that passes through Luxembourg significantly decreased starting in 2015, that would support that theory. An International Monetary Fund (IMF) study

348. Chaouche, *supra* note 185, at 16 (footnotes omitted) (original in French).

349. *See supra* text accompanying note 302 (tbl. 4).

350. Press Release, *supra* note 144, at 3 (“The administration will issue further circulars on the interpretation and application of certain provisions and issues of the tax law which are frequently raised by individual tax payers in their respective ruling requests, thus limiting the need to revert to rulings with regard to those provisions and issues.”).

351. *See Recueil de Circulaires*, GOUVERNEMENT.LU (last updated January 10, 2024), <https://impotsdirects.public.lu/fr/legislation/circulaires.html> [<https://perma.cc/JV26-UDNA>]. As an example, at press time, the list of income tax Circulars is numbered 1 through 189. *See id.* (Circulars “en matière d’impôt sur le revenu”) (last visited Jan. 14, 2024). Of those, over 85 were issued since 2015, though some of those simply repeal other Circulars. *See id.* (count done by the author). Some of the Circulars superseded previous ones, including other Circulars issued since 2015. *See id.*

352. *See* Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301, 302 (2010-2011) (“Perhaps the most general type of tax opinion is what might be called a ‘comfort opinion.’ A comfort opinion ... simply gives a taxpayer comfort that a transaction that he is considering entering into will, in fact, have the expected tax consequences.”).

353. *See supra* text accompanying notes 208-209.

explains that special purpose entities, usually SOPARFIs, “are responsible for the lion[s] share of the reported foreign direct investment (FDI) in and out of Luxembourg.”³⁵⁴ Thus, changes in number and funding of Luxembourg SOPARFIs should provide a window into changes in investment in Luxembourg.

The IMF study did not find a decline starting in 2015. Instead, it found that the number of SOPARFIs in Luxembourg and SOPARFIs’ expenditure in Luxembourg grew fairly steadily between 2012 and 2018.³⁵⁵ The same IMF study shows tax payments by Luxembourg SOPARFIs as a percentage of GDP as relatively flat from 2011 through 2015, increasing fairly sharply from through 2015 through 2018 and declining slightly in 2019.³⁵⁶

The IMF study found 2018, not any earlier year, to be a critical point for investment decline. The IMF’s chart showing Luxembourg’s gross foreign direct investment (FDI) inflow shows a drop from 2016 to 2018,³⁵⁷ with the 2018 inflow figure negative.³⁵⁸ The IMF observes, “While FDI stocks remain elevated, we observe a relatively large negative gross FDI inflow of €400 billion in 2018 and 2019, against gross inflows of €200 to 600 billion over the past 5 years”³⁵⁹ The study hypothesizes that some of the change in 2018 is due to the U.S. tax reform that occurred at the end of 2017 (the law known as the Tax Cuts and Jobs Act), which made major changes to U.S. international tax law, including the “adoption of antitax avoidance measures.”³⁶⁰ As evidence of this, the IMF points both to (1) direct repatriation of dividends by U.S.-owned multinationals and (2) indirect repatriation by moving capital out of Luxembourg and into third countries, such as the Netherlands, and repatriating it from there.³⁶¹

Thus, the IMF study suggests that multinationals did not quickly withdraw en masse from Luxembourg once Luxembourg codified its tax-

354. Ruud De Mooij et al., *International Taxation and Luxembourg’s Economy* 13 (Working Paper, 2020), <https://www.elibrary.imf.org/view/journals/001/2020/264/article-A001-en.xml> [https://perma.cc/76L8-6KXD].

355. *Id.* at 13 fig. 8.

356. *Id.* at 16 fig. 10.

357. *Id.* at 18 fig. 11. The IMF’s chart of “Luxembourg: Gross FDI Inflow, 2013-2018” also shows a decrease from 2013 to 2014, a gain of about the same amount from 2014 to 2015, and then the steady drop from 2016 through 2018. *Id.*

The IMF also found that, in 2018, 2,800 SPEs in Luxembourg had an aggregate of €8.6 trillion and produced €1.6 billion in business-tax revenue, *id.* at 15 & tbl. 3—a slightly larger number than the €1.5 billion of corporate tax revenue that the *Wall Street Journal* referred to in 2014. *See supra* note 12 and accompanying text.

358. De Mooij et al., *supra* note 354, at 18 fig. 11.

359. *Id.* (emphasis removed).

360. *Id.*

361. *Id.*

rulings process at the end of 2014. However, there was some decline in Luxembourg SOPARFIs in subsequent years. The IMF study found that the number of Luxembourg SOPARFIs reached its high point in 2016.³⁶² In addition, the balance sheets of these entities dropped from an aggregate of “EUR 9,6 trillion in 2016 to EUR 8,6 trillion in 2018, mainly due to a reduction of participating interests in pure holding companies”³⁶³ The IMF states that the change “could be explained by the [late 2017] US tax reform, which induced US-based companies to pay back dividends or restructure their finances: the share of US assets indeed dropped between 2016 and 2018 from 25 to 18 percent”³⁶⁴ Of course, while U.S. tax reform helps explain changes after 2017, it would not explain the drop in SOPARFIs from 2016 to 2017. It is possible that E.U. changes, such as DAC 6, influenced that.

Thus, it is certainly possible that the change in Luxembourg’s tax-rulings process caused some shifting of investment to other countries, but it does not seem to have occasioned a precipitous decline. It appears that investment in Luxembourg continues, just with much less use of tax rulings. The available data show a precipitous decline in the use of Luxembourg tax rulings around the time Luxembourg changed its procedures, but without a corresponding increase in other countries’ rulings or immediate capital flight. It remains to be seen what will happen as we approach the tenth anniversary of LuxLeaks.

Conclusion

LuxLeaks brought to light a previously opaque rulings process that provided enormous, secret tax breaks for multinational companies such as Disney, Koch Industries, and Staples, but it did not reveal how the small country of Luxembourg developed such a prolific and robust rulings system. This Article has explained that tax advisers from the Netherlands helped bring the tax rulings process to Luxembourg, while Big 4 accounting firms such as PwC helped it grow.

A Luxembourg tax office, headed for many years by a tax administrator named Marius Kohl was receptive to granting these rulings. This Article has shown that *amenability* of the Luxembourg tax administration during the Kohl era and *trust* by tax advisers in that administration were two key factors in the growth of Luxembourg’s informal rulings system. When Mr. Kohl retired, the Luxembourg tax administration withdrew some of the rulings he had signed, and the rulings process also began to take longer.

362. *Id.* at 13 fig. 8. Luxembourg had 46,238 SOPARFIs in 2016; 45,613 in 2018; and 45,231 in 2019. *Id.* at 13, 14 tbl. 3.

363. *Id.* at 18.

364. *Id.*

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Secrecy that limited accountability for many years was the third critical factor in how Luxembourg's informal rulings system flourished. Ultimately, leaks breached that secrecy. Not only did Luxembourg enact codified procedures shortly after LuxLeaks, but Luxembourg's Ministry of Finance submitted the codification legislation only one day after the International Consortium of Investigative Journalists sent the Finance Minister a letter containing probing questions about the previously confidential and informal process.

Luxembourg's informal rulings process officially came to an end with codification of a new tax rulings procedure. The codified process removed the ability of a single tax-administration employee, such as Mr. Kohl, to grant official rulings. Instead, Luxembourg's official tax rulings are issued by a committee whose members are not listed publicly. The process is slower, more expensive, somewhat more transparent, and has resulted in an increased rate of denials of rulings requests. Thus, it may not be surprising that the volume of Luxembourg rulings requests has plummeted. The Article has shown that the timing of the precipitous decline in volume of Luxembourg's tax rulings is idiosyncratic compared to other countries, and that it tracks the timing of Luxembourg's implementation of its new process.

Despite the decline in rulings, it does not appear that multinationals immediately fled Luxembourg, as statistics on holding companies in Luxembourg show. Multinationals may have turned in part to other means of obtaining assurance as to the desired tax treatment. An informal and nontransparent "information letter" process allegedly arose in Luxembourg shortly after Luxembourg codified its tax rulings procedure. If true, that suggests continued amenability on the part of the tax administration, continued trust by tax advisers, and a preference on the part of some for a nontransparent informal process over Luxembourg's codified rulings process. This Article is therefore in part a cautionary tale about how that trifecta of factors may combine to allow tax breaks that might not hold up well to public scrutiny.

Changes in substantive tax laws can eliminate ways of dodging taxes, but, as with domestic tax shelters, tax advisers may derive new ways to reduce taxes in ways that legislatures did not intend. Transparency therefore plays a critical role. Transparency of tax rulings helps protect all stakeholders—taxpayers, tax advisers, and even governments.³⁶⁵ The companion article in this two-part project explores that issue in detail, advocating for public disclosure of anonymized letter rulings and

³⁶⁵. See generally Lederman, *supra* note 39 (arguing for transparency of letter rulings and APAs, and cataloguing the benefits to these three groups).

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APAs.³⁶⁶ Transparency of institutions should help reduce amenability to sweetheart deals, as well as reducing trust by advisers that any such deals are ironclad.³⁶⁷

³⁶⁶. *See generally id.*

³⁶⁷. *Cf. id.* at 240 (“Corruption relies on secrecy. Conversely, secrecy increases the risk of corruption.”) (footnote omitted).

Appendix

Tbl. 5. OECD Rulings-Exchange Data (Selected Countries)³⁶⁸

Country	“Past Rulings”	Apr. 1- Dec. 31, 2016	2017	2018	2019	2020
Argentina	2	0	1	0	1	0
Australia	202	15	13	10	15	16
Austria	59	13	10	9	14	23
Belgium	586	57	107	103	73	74
Brazil	10	1	2	5	0	0
Canada	12	2	2	1	1	1
Chile	0	0	0	0	2	0
China	11	6	3	2	4	15
Columbia	1	0	0	0	0	0
Czech Republic	48	5	11	7	19	15
Denmark	43	7	17	13	14	9
Estonia	20	8	11	9	9	7
Finland	42	13	19	8	32	27
France	45	4	6	6	16	8
Germany	30	7	10	10	8	13
Greece	1	0	0	2	0	1
Hungary	77	4	9	11	21	18
Iceland	1	0	0	0	0	0
India	69	55	73	44	137	28
Indonesia	0	0	0	0	1	1
Ireland	29	0	2	39	5	4
Israel	79	5	3	15	30	15
Italy	58	39	123	308	206	224
Japan	51	12	14	16	4	29
Korea	45	1	4	5	5	12

368. Table 5 includes OECD data for countries for which the “past rulings” period is “(i) on or after 1 January 2014 but before 1 April 2016; or (ii) on or after 1 January 2010 but before 1 January 2014, provided they were still in effect as at 1 January 2014.” See OECD, 2021, *supra* note 310, at 41, 53, 57, 65, 83, 100, 104, 108, 112, 131, 140, 154, 167, 171, 184, 193, 208, 213, 216, 221, 225, 232, 238, 247, 267, 271, 283, 303, 315, 321, 325, 337, 341, 354, 384, 388, 391, 394, 418, 426, 431.

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Latvia	1	1	2	3	4	4
<i>Luxembourg</i>	<i>1,922</i>	<i>73</i>	<i>18</i>	<i>9</i>	<i>3</i>	<i>0</i>
Mexico	13	1	328	294	48	44
Netherlands	2,206	297	214	272	403	263
New Zealand	69	14	15	8	21	18
Norway	1	0	1	0	0	0
Poland	84	6	20	16	100	108
Portugal	24	2	11	11	6	6
Russia	1	0	0	0	0	0
Slovak Republic	1	2	5	3	3	3
Slovenia	8	0	1	1	2	0
South Africa	1	0	0	0	0	0
Spain	146	28	46	22	19	43
Turkey	3	0	8	0	0	0
United Kingdom	599	71	16	20	14	13
United States	114	21	30	27	30	18