

# Politics, Policies, Technical Aspects, and Effects of the U.S. Tax Cuts and Jobs Act

H. David Rosenbloom  
Washington, DC  
May 10, 2019

## I. Background on the TCJA

- A. Massive Tax Legislation Enacted December 22, 2017
- B. Not a Single Democratic Vote in Favor
- C. Particular Focus on (1) Cross-Border Income and Investments of (2) Corporations
- D. Thousands of Pages of Regulations Issued Over the Past Several Months

D. Pre-Existing International Tax Policies (Intended or Not):

1. Combat Base Erosion by Limiting or Questioning Deductions by Inbound Investors on a Piecemeal Basis (Earnings Stripping Rules, Limitation on Benefits, Transfer Pricing)
2. Two Sets of Anti-Abuse Rules Aimed at (Largely Passive) Outbound Investments (Subpart F, PFIC), Plus Transfer Pricing, Including Cost-Sharing
3. Nevertheless, Effective Exemption for Much Income From Active Operations

## II. The New Rules

- A. Reduction of Corporate Tax Rate From 35 Percent to 21 Percent
- B. Expensing of Capital Investments
- C. Fresh Start for Specified Foreign Corporations (Controlled Foreign Corporations and Certain Others), With Mandatory Deemed Repatriation of Post-1986 Earnings
- D. Going Forward, Minimum Tax on Earnings of Controlled Foreign Corporations (Global Intangible Low-Tax Income (GILTI) Rules), With Some Exemptions
- E. Alternative Minimum Tax Aimed at Base Eroding Deductions
- F. Export-Promotion Rule for Foreign Derived Intangible Income
- G. Stringent Limitation on Interest Deduction and Strict Anti-Hybrid Rules
- H. Acceptance of Tax Authorities' Position on Cost Sharing
- I. Brand-New Concepts and Intricate, Highly Technical Provisions



- J. Discontinuities, Errors, Odd Policy Choices, Illogical Consequences
- K. New Rules Placed on Top of Pre-Existing Rules
- L. Individuals Largely Forgotten
- M. Potential WTO Challenges
- N. Inconsistencies With Tax Treaties

### III. Effects

- A. Too Soon To Tell — Predictions of Massive U.S. Investment, Repatriation of Assets to the United States, Large Revenue Gains Seem Exaggerated
- B. Complexity, Instability of the Rules Has Paralyzed Many Companies
- C. Dramatic Increase to the Deficit — the TCJA Is Funded With Borrowed Money
- D. Other Countries Are Bound To React, Whether With Counter-Provisions or Copycat Rules, But the Learning Process Is Slow and Painful
- E. Political Situation in the United States Makes Correction of Errors Very Difficult

# Tax Rulings and Transparency

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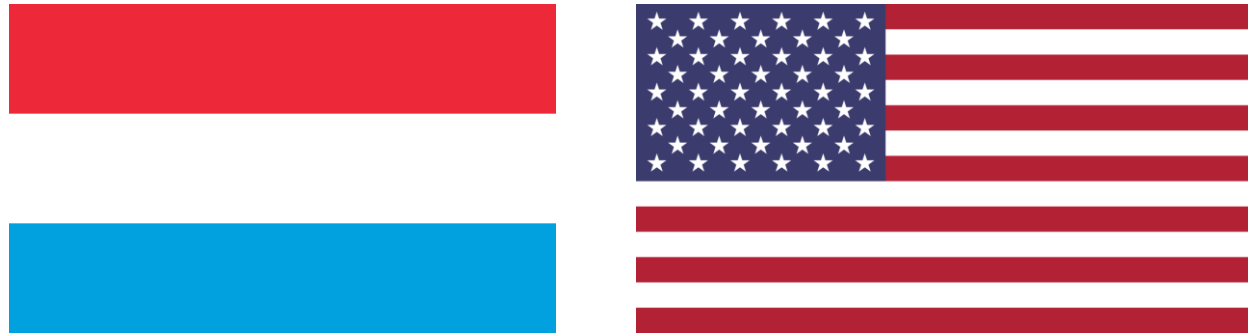
MAURER SCHOOL OF LAW  
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University of Luxembourg  
May 22, 2019

# Description of the Project

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## ➤ Comparative: Luxembourg & the United States



## ➤ Funded in part by the Belgium-Luxembourg Fulbright Commission

# Structure of the Talk

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- Brief background on advance tax rulings & APAs
- Changes in transparency of rulings in the U.S. & Luxembourg
- Typology of risks of non-transparent rulings, with examples
- How each risk can be addressed
- Possible implications

# Brief Background on Rulings & APAs

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## ➤ Types of tax rulings:

- Advance tax ruling (“letter ruling” or “PLR” in U.S.)
  - Assurance from the tax administration in advance of a transaction
- Advance Pricing Agreements (APAs)
  - For transfer pricing
  - May be unilateral, bilateral, or multilateral

# Competing Values

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**Privacy**

**Transparency**

# Transparency Evolution in U.S. (PLRs)

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## ➤ Letter Rulings (PLRs)

- Until mid-1970s, PLRs were not public
- In 1975, IRS lost 2 cases under FOIA:
  - *Tax Analysts and Advocates v. IRS* (D.D.C. 1975)
  - *Freuhauf Corporation v. IRS* (6th Cir. 1975)
- In 1976, Congress enacted IRC § 6110
  - Makes anonymized PLRs public
  - States that they may not be used as precedent



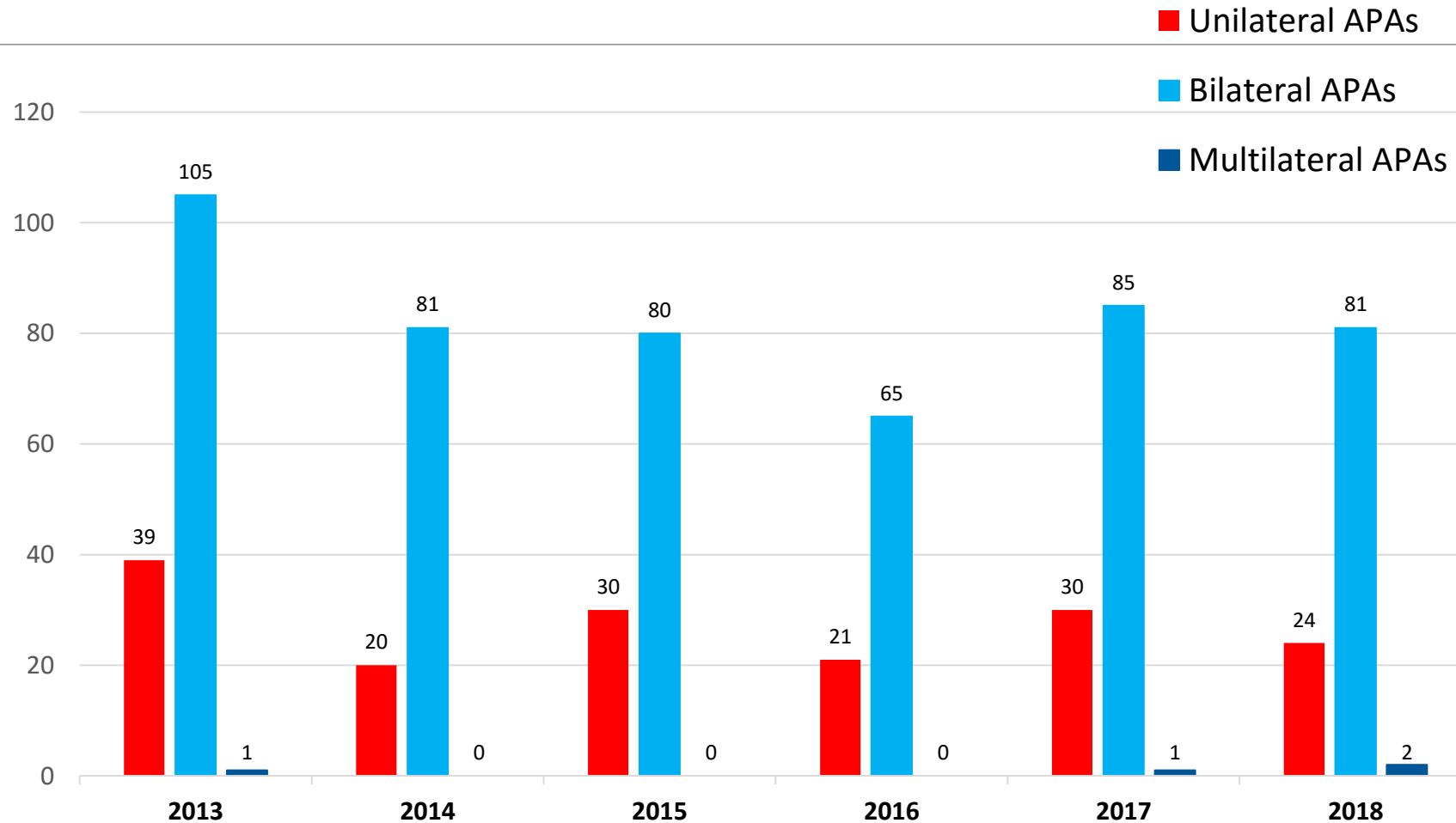
# Transparency Evolution in U.S. (APAs)

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## ➤ Advance Pricing Agreements (APAs)

- Formal APA program began in U.S. 1991
  - IRS treated as confidential tax return information
  - BNA sued in 1996 under FOIA & IRC § 6110, for release of the transfer pricing methodologies
    - In 1999, IRS conceded under 6110; lobbying Congress followed
- Congress amended IRC § 6103 in 1999 to add (b)(2)(C)
  - Makes APAs confidential “return information”

# U.S. APAs by Type, 2013-2018



# Summary of Current U.S. Approach

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## ➤ Letter Rulings:

- Publically available
- Anonymized

## ➤ Advance Pricing Agreements:

- Confidential return information
- General statistics released
- BEPS Action 5: IRS exchanges summary info on unilateral APAs

# Transparency Evolution in Luxembourg

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## **PRE-2015**

- Informal (uncodified)
- Rulings could be issued by 1 person (e.g., Marius Kohl)
- No fee
- Very quick
- Confidential

## **2015 ON**

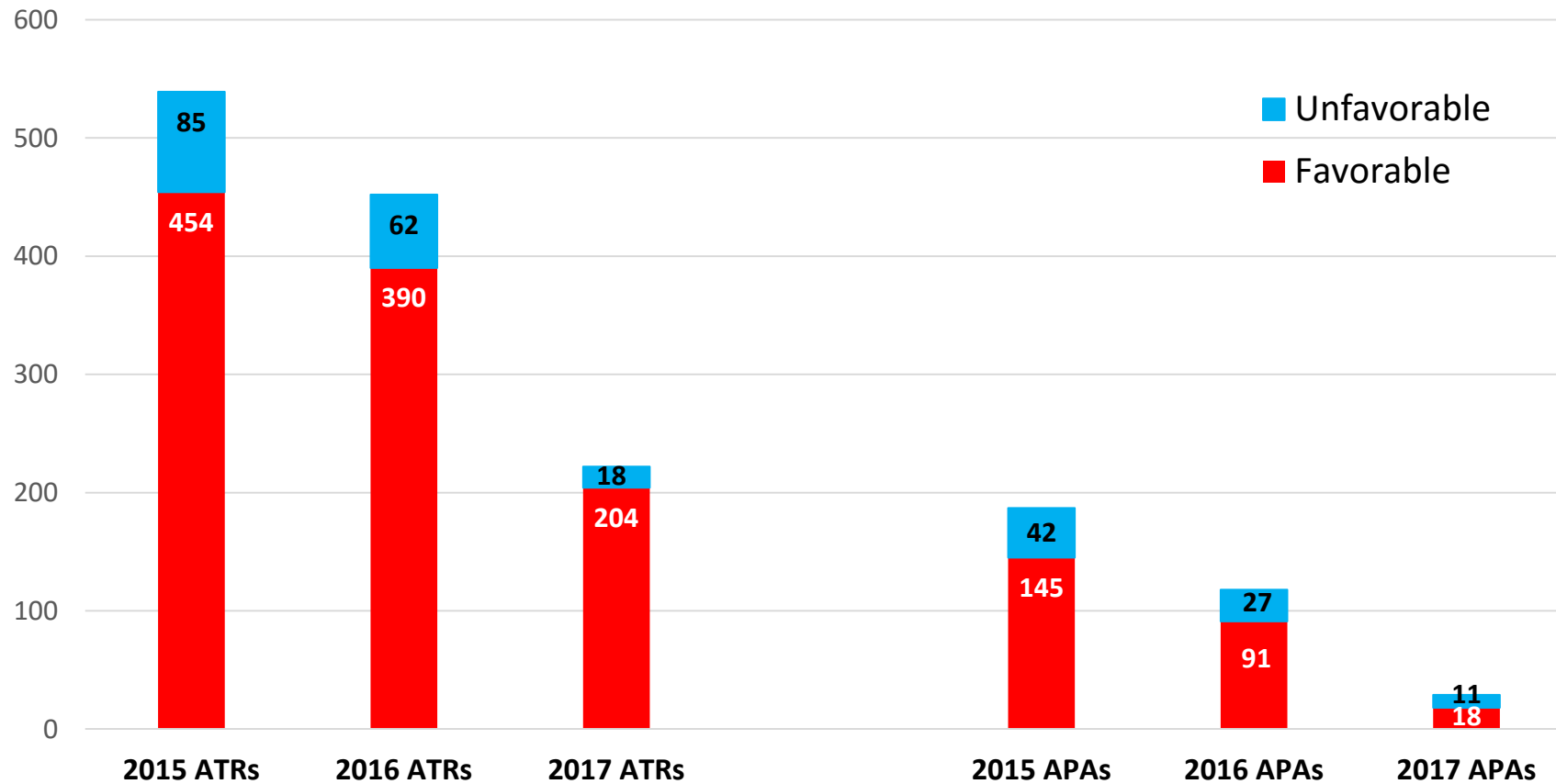
- Statutory process
- Rulings issued by Committee (members confidential)
- Fee charged
- Much slower process
- Statistics released; exchanges under European Commission & BEPS rules

# Volume of Rulings Exchanged per OECD (Selected Countries)

COUNTRY	NUMBER OF PAST RULINGS EXCHANGED*	RULINGS FROM APR. 1 TO DEC. 31, 2016	RULINGS FROM 2017	CHANGE FROM 2016 (PARTIAL YEAR) TO 2017
Belgium	586	57	107	up 106%
France	45	4	6	up 50%
Germany	30	7	10	up 43%
Ireland	29	0	2	up from 0
<b>Luxembourg</b>	<b>7,894</b>	<b>219</b>	<b>18</b>	<b>down 91%</b>
The Netherlands	2,198	297	213	down 28%
Norway	1	0	0	-no change-
United Kingdom	599	71	16	down 77%
<b>United States</b>	<b>114</b>	<b>21</b>	<b>30</b>	<b>up 43%</b>

\* Past rulings are those issued on or after Jan. 1, 2010 and still in effect on Jan. 1, 2014

# Volume of Luxembourg Rulings & APAs, 2015-2017



# Secrecy and Revelations



# A Tentative Typology of Risks of Nontransparent Tax Rulings

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➤ **Tax Advisers:** Lack of level playing field for small advisers

➤ **Country:** Reduced revenues due to weak tax enforcement

➤ **Taxpayers:** Possible inconsistent rulings by tax administration

➤ **Country:** Corruption by individual tax officials

➤ **Taxpayers:** Possible lack of information/access for unsophisticated

➤ **Country:** Loss of tax base due to other countries' rulings



# A Tentative Typology of Risks With Examples

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➤ **Tax Advisers:** Lack of level playing field for small advisers

- U.S. large firms' libraries of PLRs in 1970s

➤ **Taxpayers:** Possible inconsistent rulings by tax administration

- *IBM Corp. v. U.S.*, 343 F.2d 914 (Ct. Cl. 1965)

➤ **Taxpayers:** Possible lack of information/access for unsophisticated

- Allegations that a tax adviser is needed

➤ **Country:** Reduced revenues due to weak tax enforcement

- Allegedly in suppressed U.S. Senate 2003 APA report
- May 1965 "Du Pont tax favoritism" costing U.S. \$56M

➤ **Country:** Corruption by individual tax officials

- Paul Daubenfeld case; he alleged 7 other ACD tax officials involved

➤ **Country:** Loss of tax base due to other countries' rulings

- LuxLeaks (**Luxembourg**)
- Simmons & Simmons leaked report (**France**)
- Primarolo Report (**Belgium, Netherlands**)

# Which Measures Address Which Risks?\*

Risk		DISCLOSURE TO DOMESTIC WATCHDOG GROUP	DISCLOSURE TO INTERNATIONAL WATCHDOG GROUP	DISCLOSURE TO OTHER COUNTRIES	DISCLOSURE TO TAX ADVISERS	DISCLOSURE TO PUBLIC
Advisers	Lack of level playing field for advisers	✓	✓	X	✓	✓
	Inconsistent rulings hurting taxpayers	✓	~	X	~	✓
Taxpayers	Lack of access for unsophisticated taxpayers	✓	~	X	X	✓
	Weak tax enforcement reducing revenue	✓	~	X	X	✓
Countries	Corruption by individual tax officials	✓	~	~	~	✓
	Other countries' rulings harming tax base	X	✓	✓	X	✓

\* Preliminary and tentative analysis

# Implications (Tentative)

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- Disclosure to public (full transparency) avoids risks resulting from secrecy
  - But it sacrifices taxpayer privacy
- The current OECD and European Commission approaches focus on harmful tax practices, not other risks of rulings

Comments are welcome at  
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Thank you!

# Transparency of tax rulings

Tina Ehrke-Rabel

- **Tax rulings bear risks**
  - threat of a damage
- **Objective of transparency**
  - deterrence
  - detection of a damage (likely) to occur
- **Costs of transparency**
  - **Privacy**
    - role of privacy in a democratic society
    - Legitimate limitations to privacy
- **Right of access to rulings derived from freedom of expression?**

- Right of access to rulings derived from freedom of expression?
  - **Art 10 European Human Rights Convention**
    - Everyone has the right to freedom of expression (...) include freedom to hold opinions and to receive impart information and ideas without interference by public authorities ...
    - (...) subject to such formalities, conditions, restrictions or penalties as prescribed by law and necessary in a democratic society (...) for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence
- **Do we really need to sacrifice core values of personal autonomy to reduce a risk of damage?**
- **Aren't there less intrusive measures that could be put in place?**

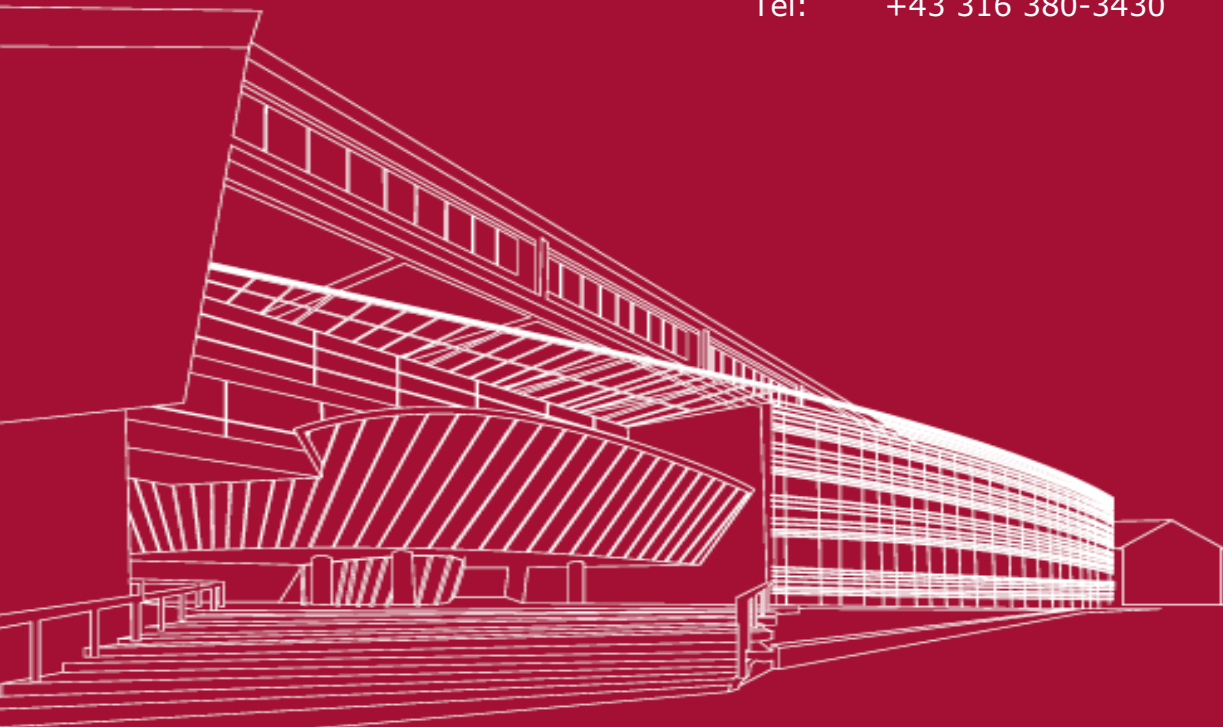
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# The Digital Tax Future in the US and the EU

Yariv Brauner

# Introduction

- Background
- The Problem
- The **Proposal**
- Why New Law for Taxing the Digitalized Economy?
- Alternatives
- Conclusion: the Inevitable Reform

# Background: International Tax Regime at Risk

- **Competition** framework
  - Not institutionalized
  - No supra-nationality
  - Weak dispute resolution
- Essentially based on **Physical presence**
- Technical challenges to the Regime
- Political challenges
  - The rise of the BRICS
  - The old powers begin to lose control
  - Powerful MNE

# Background: International Tax Regime at Risk

- The insufficiency of the information exchange agenda
- The global financial crisis
  - Insufficient source taxation (calls for **fairer** division of tax bases)
  - **Insufficient** revenue to all
- BEPS













# Unprincipled Reform

- Value creation celebrated as a unifying principle, but not really...
  - Residence taxation continues to dominate
- Arm's length elevated to a principle
- The single tax principle
- **Minimum** standards
- Increasing costs of compliance & enforcement... **less certainty**



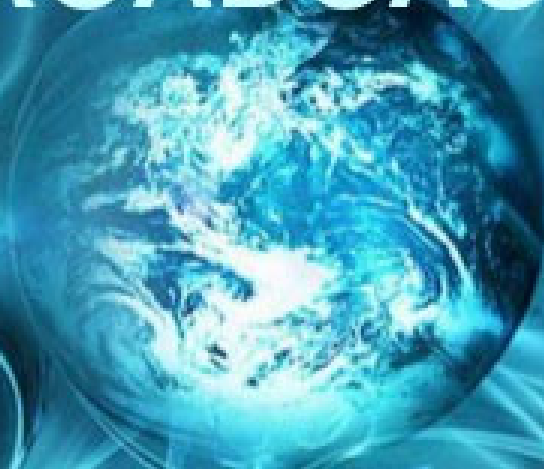








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A Venn diagram consisting of two concentric circles. The outer circle is a dark blue color and contains the text 'B2B' and '\$559B'. The inner circle is a lighter blue color and contains the text 'B2C' and '\$252B'. The circles are centered on the page.

**B2B**  
**\$559B**

**B2C**  
**\$252B**

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# "Equalisation Levy"



# The Withholding Solution

## ■ The proposal

- A standard (10%) final withholding tax on all **base-eroding payments** to identified non-residents
- A standard exemption from such withholding for payments made to payees registered to be taxed under a net taxation scheme
- Existing withholding tax arrangements, such as those on wages, rents and interest, should continue to apply, exempting their subject payments from the above-mentioned tax
- A higher WHT (15%) on payments to non-identified Payees
- Domestic **deductions** must **match** a **registered payment** under one of the above schemes

## ■ **B2C** and other non-base eroding payment cannot be enforced through matching

- Apply WHT obligations to financial institutions

# The Withholding Solution

## ■ Advantages

- No ringfencing
- No definitions
- Focus on B2B – Base erosion, key difficulties and most revenue
- Tackles both Base Erosion and Profit Shifting
- Familiar, regime compatible measures
- Pays within the game / versatile

## ■ More Source Taxation

# Why New Law for Taxing the Digitalized Economy?

- Current law is insufficient, not just inferior to alternatives
  - BEPS, unilateral measures
  - Multiple studies: governments, NGOs, scholars
- Well known technical issues
  - Physical presence
  - Residence/source
  - ALS
- Waiting is costly





# The Alternatives

## ■ Virtual PE / Substantial Economic presence

- Ringfencing

## ■ Factors

- Users

- Sales

- Other digital factors

- Real meaning of factors

## ■ Profit Allocation

# The Alternatives

- Focus on Profit Attribution
  - Nexus?
- User Participation
  - Marketing Intangibles
- GILTI & Co.
  - Global minimum tax
  - Base erosion component
- Profit shifting
- Residence taxation



# The Alternatives

- Equalization Levies / Turnover Taxes / DST
  - **The European digital tax**
- DBCFT
- A word on VAT



# Thank You!

- General discussion