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E-News from the EU Tax Centre

Issue 125 – February 9, 2021

KPMG's EU Tax Centre compiles a regular update of EU and international tax developments that can have both a domestic and a cross-border impact, with the aim of helping you keep track of and understand these developments and how they can impact your business.

State Aid

European Commission's application to appeal the General Court's judgment in a case regarding Irish tax rulings

On January 15, 2021, the European Commission submitted its application to appeal the July 2020 judgment of the General Court of the European Union (EU) in case T-778/16 on two tax rulings issued by the Irish tax authorities in favor of two companies incorporated in Ireland, but not tax resident in Ireland. The contested tax rulings endorsed the profit allocation methods related to the trading activity of the Irish branches of the two entities concerned.

In its judgment, the General Court annulled the European Commission's decision 2017/1283 ("Decision") that Ireland had granted illegal state aid. For more information, please refer to E-news Issue 120. The Commission had previously announced its decision to appeal the decision.

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The application details the grounds for the appeal, where the Commissions argues that the General Court misinterpreted the Decision by concluding that the primary finding of the advantage relied solely on the lack of employees and physical presence in the head office, and not considering the Commissions explanations on the functions performed by the head offices and the Irish branches, respectively. The Commission is of the view that the General Court violates the separate entity approach and the ALP (arm's length principle), which constitutes an infringement of EU law and/or a distortion of national law. The Commission further argues that the General Court's reliance on inadmissible evidence in support of its finding is a breach of procedure.

In its second ground of appeal, the Commission claims that the General Court committed errors of law by rejecting the Decision's subsidiary finding of advantage. Among others, the Commission argues that the General Court commits an error of law in the application of the rules on the standard of proof the Commission must meet to show an advantage.

EU Institutions

EUROPEAN COMMISSION

European Court of Auditors report on the effectiveness of tax information exchange

On January 26, 2021, the European Court of Auditors published a report on the effectiveness of the exchange of tax information system in the EU, covering the period from 2014 to 2019. The report assessed the activity of the European Commission and of five Member States (Cyprus, Italy, the Netherlands, Poland and Spain), which were selected based on quantitative and qualitative risk criteria.

The main finding of the report is that, though well established, the exchange of tax information system needs to be improved in terms of monitoring, ensuring data quality and using the information received.

The Court of Auditors made a number of recommendations, aimed at improving the effectiveness of the information exchange system, including:

- the European Commission should take direct and effective actions to address the lack of quality of data sent by Member States, as well as expand its monitoring activities and add to its guidance for Member States;
- Member States should ensure that the information they exchange is complete and of sufficient quality, introduce systematic procedures for the risk analysis of incoming information and use it as extensively as possible;
- the European Commission should establish, together with the Member States, a reliable common framework for measuring the benefits of the system for exchange of tax information.

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Further extension and expansion of the EU State Aid Temporary Framework

On January 18, 2020, the Commission announced its decision to prolong all sections of the State aid Temporary Framework until December 31, 2021. This fifth amendment includes provisions to expand the scope of the Temporary Framework by:

- increasing aid ceilings, and
- allowing the conversion of certain repayable instruments into direct grants.

As at February 3, 2021, the European Commission had approved over 390 State aid measures adopted under the Temporary Framework and Articles 107(2)b, 107(3)b and 107(3) of the Treaty on the Functioning of the EU (TFEU).

For further details on the Temporary Framework, please refer to EU Tax Centre's ETF 429.

COUNCIL OF THE EU

Proposal to amend the Securitization Regulation - EU list of non-cooperative jurisdictions

On December 15, 2020, the Council issued the compromise text reached further to discussions with the European Parliament as part of the legislative procedure for the adoption of a proposed amendment to the EU Securitization Regulation 2017/2402.

Under the current provisions of the Regulation, securitization special purpose entities (SSPEs) should only be established in third countries that are not listed by the EU as high-risk third countries having strategic deficiencies in their regime on anti-money laundering and counter terrorist financing or that do not exchange information with the Member States. The agreed-upon changes aim to extend these restrictions to third countries listed on the EU list of non-cooperative jurisdictions - both under Annex I (the EU "blacklist") and Annex II (EU "grey list").

The European Parliament is expected to vote on the amendments during the March 8, 2021 plenary sitting.

EUROPEAN PARLIAMENT

FISC public meeting regarding the impact of Brexit on the level playing field in the area of taxation

On January 26, 2021, the European Parliament Subcommittee on Tax Matters (FISC) exchanged views with the European Commission and a panel of experts regarding the impact on tax policy of post-Brexit UK.

One of the topics discussed was how Brexit is expected to affect the Code of Conduct Group's future assessment of the UK; FISC members expressed concerns on the effectiveness of the EU-UK Trade and Cooperation Agreement on combating harmful tax practices. A European Commission official noted their support for reforming the EU list of non-cooperative jurisdictions by including countries with zero percent tax rates, as long as the measures are in line with the

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work undertaken at the level of the Organization for Economic Co-operation and Development (OECD) under Pillar Two (Minimum Global Taxation).

For more details please refer to FISC's press release or watch the replay of the hearings on the dedicated webpage of the meeting.

OECD

Meeting of the OECD/G20 Inclusive Framework on BEPS

On January 27-28, 2021, the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) held a virtual public two-day meeting covering their international tax related workstreams.

The first day was focused on current and post COVID-19 challenges faced by countries, the progress towards the sustainable development goals and the role that tax can play in achieving them and on tax morale among businesses. Finance Ministers from six jurisdictions (Germany, France, Canada, UK, Indonesia and Jamaica) stressed the importance of reaching a consensus solution on taxation of the digital economy by mid-2021 and expressed their confidence that a positive outcome would be achieved.

The agenda for the second day included discussions on the tax challenges arising from digitalization and the future of international taxation, following the public consultation meeting hosted by the OECD on January 14-15, 2021 on the Pillar One and Pillar Two Blueprints. Finance ministers from the abovementioned jurisdictions acknowledged the existence of different views among countries, however they indicated that there is a clear need for compromise and that a global consensus agreement is the only way forward.

A brief update on the ongoing work on BEPS and tax certainty, tax transparency policies and exchange of information, on tax administration 3.0 and the green agenda was also provided during the second day.

For more details please refer to OECD's press release, which includes links to the replays of the discussions.

Public consultation meeting on the review of BEPS Action 14 – Mutual Agreement Procedure

On February 1, 2021, the OECD held a virtual public consultation on the review of BEPS Action 14 – Mutual Agreement Procedure. The meeting follows an earlier request for public comments aimed to make dispute resolution mechanisms more effective – for more details please refer to KPMG's comments submitted in respect of the Action 14 consultation paper.

For more details on the meeting or to watch the replay of the discussions, please refer to the OECD's press release.

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Inclusive Framework Membership

In February 2021, Belarus and Samoa joined the Inclusive Framework on BEPS (IF), bringing the total membership up to 139 jurisdictions worldwide.

Please see the complete IF Member List.

Local Law and Regulations

Czech Republic

Tax implications for certain non-resident funds of disposing of shares in Czech companies

Under Czech tax law, non-resident entities selling shares in Czech companies are subject to corporate income tax reporting and payment obligations. While most double tax treaties include double taxation relief, some treaties – such as those with Germany and Lichtenstein – allocate, in certain cases, the right to tax the related capital gains to the Czech Republic.

In practice, this means that investment funds based in these two countries and that dispose of shares in Czech companies may have to register for corporate income tax purposes in the Czech Republic, file a tax return with the tax authorities and pay (if the case) the related corporate income tax. The tax is computed by applying the standard tax rate (19%) to the capital gains derived. It has been reported that the Czech tax authorities have launched investigations into non-compliance with these reporting and payment obligations, using the information received under existing exchange of information mechanisms.

For more details please refer to a tax alert prepared by KPMG in Switzerland.

Denmark

Disallowance of deductibility and increased dividend taxation for payments to non-cooperative jurisdictions

On January 27, 2021, a draft proposal was submitted to the Danish parliament aimed at introducing anti-avoidance rules based on the EU list of non-cooperative jurisdictions.

The proposal follows guidance from the Council of the EU on coordination of national tax defensive measures against non-cooperative jurisdictions, whereby Member States were invited to apply legislative defensive measure as of January 1, 2021 (or July 1, 2021 should they face institutional or constitutional issues) – see KPMG's EU Tax Centre ETF 435 for more details.

Proposed changes in Denmark apply to entities from a country on the EU list of non-cooperative jurisdictions, or to entities other than the beneficial owner, which pass the payments to a recipient in a country on the EU list of non-cooperative jurisdictions, and include:

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- disallowing the deductibility of payments made to entities in scope;
- an increased withholding tax of 44% on dividends paid to entities in scope (the standard withholding rate for dividends paid to non-resident companies is currently 27 percent).

If enacted, the new rules will become effective starting from July 1, 2021, and would not apply to the extent that the relevant jurisdiction is an EU/EEA Member State or has a tax treaty with Denmark.

Germany

Draft bill proposing tighter anti-treaty / directive shopping rules and revising withholding tax rules

On January 20, 2021, the German Ministry of Finance published a draft bill tightening the German anti-treaty/directive shopping rules and revising withholding rules.

A revised rule is included in the draft law, which – in essence, provides that a foreign company, partnership, or other taxable entity will not be entitled to claim any withholding tax relief under a treaty or EU directive if a company with insufficient business substance is interposed between the shareholder and the distributing or paying domestic company.

However, it is provided that the restriction on withholding tax relief will not apply if it can be proven that none of the main purposes for the interposition of the foreign company constitutes a tax advantage. In addition, the stock exchange exemption (i.e. exemption from the anti-treaty shopping rules for foreign listed companies) shall only be applicable to the foreign company itself - the listing of its shareholder on a stock exchange shall not suffice.

For more details please refer to a tax alert prepared by KPMG in Germany.

Italy

Budget law approved

On December 30, 2020, the Italian Budget Law for 2021 was approved and published in the official gazette.

Among other changes, as of January 1, 2021 dividends distributed by Italian companies to eligible EU/EEA funds and capital gains realized from the disposal of Italian qualifying equities are not subject to tax in Italy.

For more information, please refer to a tax alert prepared by the KPMG firm in Italy.

Kenya

Digital service tax update

Regulations implementing the digital services tax in Kenya, which were introduced following the completion of public consultations launched in August last year, are effective from January 1,

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2021. The digital services tax is imposed at a rate of 1.5% on income derived from certain digital services. The deadline to file the first return and perform the first payment is February 20, 2021.

The Kenyan digital services tax regime differs from other jurisdictions' in the sense that there is no minimum revenue threshold set by the law, leading to tax reporting and payment obligations for all companies with services in scope.

For more information, please refer to a tax alert prepared by the KPMG firm in Kenya.

Luxembourg

Disallowed deductions for interest and royalties due to companies located in non-cooperative jurisdictions

On January 28, 2021, the Luxembourg parliament passed a bill disallowing the deductibility of interest and royalties due to associated enterprise from a country included on the EU list of non-cooperative jurisdictions for tax purposes (the EU blacklist).

The legislation was introduced following guidance from the Council of the EU on coordination of national tax defensive measures against non-cooperative jurisdictions (see above). The new rules will be effective from March 1, 2021 and will not apply if the taxpayer is able to prove that the transaction was performed for valid commercial reasons, reflecting economic reality.

For more information, please refer to a tax alert prepared by the KPMG firm in Luxembourg.

Poland

Draft bill on advertising contribution published for consultation

On February 2, 2021, the Polish Ministry of Finance launched a consultation on a proposal to introduce a tax on advertising revenue – "advertising contribution". The new tax will be due from traditional and online advertisers and is aimed at raising funds to mitigate the consequences of the coronavirus (COVID-19) pandemic.

The draft law includes in scope companies that generate digital advertising revenue, including digital and conventional media companies that rely on advertising revenue. The bill provides for different taxing rules depending on whether the income derives from traditional or digital advertising. Based on the proposal, digital companies with global annual revenue of EUR 750 million or more that generate over EUR 5 million in online advertising revenue within Poland would pay a 5% annual tax based on the number of in-country users.

The proposal is pending consultation, and comments are due by February 16, 2021. Currently, the expectation is that these measures would be effective from July 1, 2021.

For more information on the proposal, please refer to a tax alert prepared by the KPMG firm in Poland.

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Portugal

Changes to the exhibition levy and new levy on income from video-on-demand services

On February 17, 2021, a law introducing changes to the levies on cinematographic and audiovisual activities will enter into force, including:

- broadening the scope of the existing exhibition levy of 4% on the price paid for audiovisual commercial communication to include audiovisual commercial communication on video-sharing platforms. The exhibition levy must also be included in the taxable amount for VAT purposes;
- the introduction of a 1% levy that will be due by service providers on relevant income generated in Portugal from subscriptions or occasional transactions for video-on-demand services. Certain thresholds are provided for service providers with low turnover (less than EUR 200,000 of annual relevant income) or with low audience (less than 0.5% of active subscribers).

Further regulations are expected to address assessment, collection and payment rules.

Qatar

Transfer pricing declarations to be filed via the online tax portal

Certain taxpayers filing their corporate income tax returns via the online portal set up by the tax authorities are required to also include a transfer pricing declaration.

The Qatar tax authorities have confirmed informally that transfer pricing filing requirements apply to taxpayers whose “total value of assets” or “total revenue” exceeds threshold amounts - to be determined by the tax authorities, but expected to be QAR 10 million (approximately EUR 2.28 million).

For more details please refer to KPMG’s TaxNewsFlash.

United Kingdom

New protocol to the United Kingdom - Germany double tax treaty signed

On January 12, 2021, Germany and the United Kingdom signed a protocol amending the double tax treaty concluded between the two countries, as well as a joint declaration stating their intention to negotiate further amendments by December 31, 2021.

The protocol makes changes to reflect the parties' intention to incorporate the OECD BEPS minimum standard of preventing treaty abuse outside of, but consistently with, the OECD Multilateral Instrument (MLI), inter alia:

- amendments to reflect the parties’ intent that the treaty should not create treaty shopping opportunities;
- introduction of a principal purpose test;
- amendments to the permeant establishment definition, to insert an anti-fragmentation rule;

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- changes to the mutual agreement procedure article.

The protocol does not include changes to the withholding tax rates and it is reported that Germany was unwilling to re-negotiate rates while the EU-UK trade deal negotiations were ongoing. It is expected that the parties will further negotiate these aspects – potentially also including a nil withholding tax rate that would provide benefits similar to those previously available under the EU Parent-Subsidiary Directive.

For more details please refer to a tax alert prepared by the KPMG firm in the United Kingdom.

DAC6 administrative deferrals and other updates

Belgium

On January 28, 2021, the Belgian Tax Authorities announced an administrative deferral of reporting deadlines under the EU Directive on Administrative Cooperation (DAC6). Sanctions for late reporting will not apply until February 28, 2021 for arrangements that should have been reported in January and February 2021.

Reporting deadlines for look-back period reporting and for the periodic report on marketable arrangements remain the same, i.e. February 28, 2021 and April 30, 2021, respectively.

Cyprus

On February 3, 2021, the Cypriot Tax Authorities announced the extension of DAC6 reporting deadlines until March 31, 2021, due to the late transposition of DAC6 into Cypriot legislation (expected to be finalized by the end of February 2021).

The extension of the reporting deadlines until March 31, 2021 has been granted to intermediaries and relevant taxpayers with respect to reportable cross-border arrangements for which reporting was triggered:

- during the look-back period (June 25, 2018 to June 30, 2020);
- during the deferral period (July 1, 2020 to December 31, 2020);
- between January 1, 2021 and February 28, 2021.

Greece

On 28 January 2021, the Greek Tax Authorities announced a deferral of the reporting deadlines with respect to arrangements for which reporting was triggered during the deferral period and between January 1 and 31, 2021. For these arrangements, the 30-day deadline starts from February 1, 2021.

Reporting deadlines for look-back period reporting and for the periodic report on marketable arrangements remain the same, i.e. February 28, 2021 and April 30, 2021, respectively.

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Gibraltar

Gibraltar's Competent Authority announced that Gibraltar will be aligning its reporting requirements to those of the UK and therefore only apply provisions of DAC6 that are also required under the OECD standard (i.e. DAC6 section D hallmarks).

For more information, please refer to a report prepared by KPMG's Tax Newsflash.

Ireland

On January 27, 2021, the Irish Tax Authorities announced an update to the Tax and Duty Manual Part 33-03-33 - EU Mandatory Disclosure of Reportable Cross-Border Arrangements, to include filing instructions where certain specified information in a disclosure is subject to Legal Professional Privilege (LPP).

The Irish Tax Authorities specified that, where certain information subject to LPP has to be filed, the specific "Form DAC 6 (LPP)" should be submitted using MyEnquiries (i.e. a secure online service to send, receive and track correspondence to and from Irish Tax authorities), setting out the identity of the relevant taxpayer and other intermediaries involved in the reportable cross-border arrangement.

The Tax and Duty Manual was previously amended in December 2020 to include guidance on the application of Section C hallmarks.

Italy

On January 29, 2021, the Italian Tax Authorities announced that no penalties for late reporting will apply provided that reportable cross-border arrangements are filed by February 28, 2021. Further clarifications will be laid down in the Circular Letter on DAC6 guidance, but the Italian Tax Authorities' press release suggests that relief from penalties should apply to those arrangements that should have been disclosed in January and February 2021, i.e. arrangements for which reporting was triggered during the deferral period and between January 1 and 31, 2021, for which the reporting deadline expires before February 28, 2021.

Reporting deadlines for look-back period reporting and for the periodic report on marketable arrangements remain the same, i.e. February 28, 2021 and April 30, 2021, respectively.

Malta

On January 29, 2021, the Maltese Commissioner for Revenue announced that:

- the deadline for deferral period reporting falls on Monday, 1 February, instead of Sunday, 31 January;
- the deadline for look-back period falls on Monday, 1 March, instead of Sunday, 28 February.

Sweden

In January 2021, the Swedish Tax Authorities announced that deadlines that occur on a Saturday, Sunday or on a public holiday will be extended to the following weekday. This applies both for initial and ongoing reporting. Therefore, January and February 2021 reporting deadlines

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apply as follows:

- Monday, 1 February, instead of Sunday, 31 January;
- Monday, 1 March, instead of Sunday, 28 February.

Spain

Spain has not yet completed DAC6 transposition into national law and has not published regulations for compliance with DAC6 obligations. Deferral of the reporting timeline is therefore inevitable, albeit of unknown timing and not formally confirmed.

KPMG Insights

Taxation of the Digitalized Economy

KPMG publishes an overview of tax measures implemented, proposed and announced in response to the challenges arising from the digitalized economy. For further details concerning the tax treatment of the digital economy, including digital services tax, please refer to the dedicated KPMG page and the KPMG digital economy tax tracker mobile app

DAC6 Resources

KPMG's EU Tax Centre publishes an overview of latest developments and country summaries on the implementation of the Mandatory Disclosure Requirements (MDR of DAC6), including a DAC6 transposition and reporting overview. KPMG's DAC6 Summary and Observations memo is also available for download. For further information on how KPMG can assist you in meeting the demands of the EU MDR regime, please refer to the dedicated KPMG page.

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