E-News from KPMG's EU Tax Centre

E-News from the EU Tax Centre

Issue 127 – March 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.

Latest CJEU, EFTA and ECHR

CJEU decision on tax credits for withholding taxes on dividends paid in other EU Member States

On February 25, 2021, the Court of Justice of the European Union (CJEU) published its decision in the Société Générale SA case (C-403/19) on French tax credits for withholding taxes on dividends paid in other EU Member States.

The case involved an entity established in France, that is part of a French tax-integrated group together with its French parent company. In the context of securities lending transactions and fund structuring transactions, the taxpayer received dividends from securities held in companies resident in Italy, the United Kingdom and the Netherlands, net of the withholding tax paid, respectively, in those three countries. On the basis of the double tax treaties in place between France and the relevant EU Member States, the tax credits related to the withholding taxes

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suffered were subsequently offset by the taxpayer against the corporate income tax due in France.

Following a tax audit, the French tax authorities challenged the allocation of a fraction of those tax credits, and revised upwards the amount of the corporation tax, arguing that the tax credits should be limited to the amount of French tax corresponding to the dividend income. The taxpayer's parent company challenged this position and argued that the limitation of the tax credit would breach the free movement of capital under Article 63 of the Treaty on the Functioning of the EU (TFEU). Following the appeal process, the French Administrative Supreme Court (*Conseil d'Etat*) requested a preliminary ruling on the interpretation of article 63 TFEU.

In its decision, the CJEU endorsed the position adopted by the French Tax Authorities and held that, in the absence of discrimination, a disadvantage in the form of double taxation of foreign-source dividends that arises from the parallel exercise of the power to tax by two Member States cannot be regarded as a restriction on the free movement of capital.

In line with previous case-law, the CJEU therefore concluded that article 63 TFEU must be interpreted as not precluding legislation of a Member State which, under a scheme designed to offset the double taxation of dividends received by a company subject to corporation tax in the Member State in which it is established, which has been subject to a levy by another Member State, shall grant such a company a tax credit limited to the amount which that first Member State would receive if those dividends alone were subject to corporation tax, without offsetting in full the levy paid in that other Member State.

Advocate General opinion on relief from Italian mortgage registration tax and land registry fee

On February 25, 2021, Advocate General (AG) Hogan of the CJEU gave his opinion in the case of UBS Real Estate Kapitalanlagegesellschaft mbH v. Agenzia delle Entrate (Joined Cases C-478/19 and C-479/19) on relief from Italian mortgage registration tax and land registry fee that have to be paid out in the case of a property acquisition.

The Italian Supreme Court ("Corte Suprema di Cassazione") had requested preliminary rulings from the CJEU, asking whether EU law — in particular the freedom of establishment and free movement of capital,— precludes the application of a provision of national law, which grants a 50% reduction in mortgage registration tax and land registry fee only to closed-end real estate investment funds but not to open-end real estate investments funds (REIFs).

The AG noted that the case should be examined in the light of the free movement of capital only, as it relates to portfolio investments in Italy.

Firstly, the AG pointed out that, should it result that the provision of Italian law applies only to funds subject to Italian law, or managed by management companies governed by Italian law, there would be a direct discrimination on the basis of nationality and, as such, would likely breach the free movement of capital.

Secondly, the AG commented that the use of a criterion based on the open or closed nature of a fund as a condition for obtaining a reduction in the rate of taxes and fees such as those under dispute in this case could represent indirect discrimination on the basis of nationality as, under Italian law, REIFs can only be established in the form of closed-ended funds. In practice, Italian law only disallows the favorable regime to certain foreign REIFs, i.e. open-ended funds. The AG

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concluded, however, that the free movement of capital should be interpreted as permitting such a discrimination, provided that the justification for introducing the discriminating criterion is safeguarding the relevant real estate market against systemic risk and provided that there is no direct discrimination based on factors such as whether the funds are administered in Italy or are otherwise governed by Italian law.

Infringement Procedures & Referrals to CJEU

Commission sends letters of formal notice to France and Sweden

As part of the February 2021 infringement package, the European Commission sent letters of formal notice to:

- France: requesting it to change its withholding tax rules on dividends paid to "Unit Linked insurance" companies resident in other European Economic Area (EEA) Member States. Under these rules, French dividends received by EEA United Linked insurance companies are subject to a final withholding tax, while there French counterparts can either not pay withholding tax or are allowed to credit the withholding tax paid against French corporate income tax. The difference in treatment is deemed by the European Commission as an infringement of the free movement of capital.
- Sweden: requesting it to amend its tax rules on taxation of dividends paid to public pension institutions. While Swedish public pension funds are tax exempt, dividends paid to EU/EEA non-resident public pension funds are subject to withholding tax (commonly reduced to 15 percent under the relevant double tax treaties). The European Commission believes these rules could infringe the free movement of capital.

Both countries have two months to reply to the arguments raised by the European Commission. after which the Commission may decide to send a reasoned opinion.

For more details, please refer to the February infringements package released by the European Commission.

EU Institutions

EUROPEAN COMMISSION

European Commission communication on fiscal policy response to COVID-19

The European Commission adopted, on March 3, 2021, a communication outlining their views on how to coordinate fiscal policy at EU level in order to address the effects of the coronavirus

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(COVID-19) pandemic and support a sustainable recovery.

The report aims to assist Member States as they are preparing their Stability and Convergence Programmes, which have to be sent to the Commission in April 2021 and include their medium-term fiscal policies. The European Commission emphasizes that coordination of fiscal policy remains crucial and advises that policies should remain supportive in 2021 and 2022. Preliminary recommendations for Member States include:

- support measures should be timely, temporary and targeted;
- the focus should move from emergency relief to more targeted measures, once health risks diminish;
- once the recovery phase starts, Member States are encouraged to boost employment incentives;
- viable, but still vulnerable, companies should benefit from targeted support as they reopen;
- in the full recovery phase, fiscal policy should prioritize higher public and private investment, supporting the transition towards a green and digital economy.

The communication also outlines the European Commission's views on the general escape clause of the Stability and Growth Pact. The clause was activated in March 2020 and allows Member States to undertake measures to deal adequately with the crisis, whilst departing from the budgetary requirements that would normally apply under the European fiscal framework – see E-news Issue 117. The Commission estimates that the measures taken due to the activation of the clause reduced the GDP contraction in 2020 by around 4.5 percent, and believes that a decision to deactivate the clause should be taken following an overall assessment of the state of the economy based on quantitative criteria. Preliminary data seems to indicate that the general escape clause should continue to apply in 2022.

The European Commission also confirms their intention to relaunch the public debate on the economic governance framework.

In terms of next steps, the Commission's recommendations and insights will be used as a starting point in the upcoming ECOFIN and Eurogroup discussions. Following that, the Commission will propose detailed fiscal policy guidance and outline the assessment on the deactivation or continued application of the general escape clause, as part of their European Semester spring package.

For more information, please refer to the European Commission's communication and the related questions and answers document.

COUNCIL OF THE EU

Country-by-Country Reporting proposal update

On February 25, 2021, the EU Member States' internal market and industry ministers exchanged views on the proposed public Country-by-Country Reporting initiative, based on which it seemed that a broad political support has been achieved to move forward with the proposal. Following the debate, the Council and the European Parliament approved on March 3 and March 4, 2021 respectively, mandates for their respective negotiating positions in anticipation of the start of

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interinstitutional negotiations (so-called “trilogue”) on the public Country-by-Country Reporting proposal.

Negotiations are expected to begin shortly, with the aim to reach agreement on the directive at second reading ("early second reading agreement"), before the end of the Portuguese Presidency (first half of 2021) – see ETF 444.

Updates to the EU list of non-cooperative jurisdictions

On February 22, 2021, the Council adopted conclusions on a revised EU list of non-cooperative jurisdictions for tax purposes. The Council agreed to add Dominica to the list and to move Barbados to the “grey list”. Namibia, Morocco and Santa Lucia were removed from the document, having fulfilled all their commitments.

Following this latest revision, the EU blacklist includes the following twelve jurisdictions: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands, Vanuatu.

For more details please refer to ETF 442.

Possible re-launch of EU financial transactions tax

Taxation of the financial sector has been under discussion at the European level since 2011, when the European Commission first proposed implementing a financial transactions tax (FTT) at EU level. After initial discussions, it became apparent that unanimous support amongst EU Member States did not exist and eleven Member States decided to move ahead with the initiative under the so-called enhanced cooperation procedure.

In parallel, the FTT was mentioned as a possible new EU own resource as part of the Union’s long-term budget, whereby the European Commission committed to put forward a proposal by June 2024. In the meantime, several Member States (e.g. France, Italy, Spain) have introduced unilateral financial transaction taxes.

In an attempt to move the file forward, in February 2021, the Portuguese Presidency of the Council proposed an inclusive discussion among all Member States on tax design issues of the FTT at EU level.

For more details please refer to ETF 442.

EUROPEAN PARLIAMENT

Dividend tax refund fraud schemes

In September 2020, the European Securities and Markets Authority (ESMA) published its Final Report on its inquiry into Cum/Ex, Cum/Cum and withholding tax (WHT) reclaim schemes. ESMA’s key proposal was that national competent authorities for securities markets should be empowered to share information with the tax authorities, to assist in detecting WHT reclaim schemes.

On February 24, 2021, the European Parliament ‘s taxation subcommittee (FISC) analyzed the dividend arbitrage scandals known as CumEx/Cum-Cum and withholding tax reclaim scheme,

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which is estimated to have resulted in losses to taxpayers of at least EUR 55 billion.

The need for a clearer legal system for cooperation and information sharing between countries on tax matters was highlighted by members of the Parliament, who also called on ESMA to undertake deeper inquiries into why certain practices still exist and also to identify what improvements should be made at European and national level.

For more details please see the press release.

OECD and other International Institutions

OECD

OECD International Compliance Assurance Programme (ICAP)

On February 18, 2021, the Organisation for Economic Co-operation and Development (OECD) Forum on Tax Administration (FTA) released a new handbook for the International Compliance Assurance Programme (ICAP).

ICAP is a voluntary risk assessment and assurance program designed to facilitate open and cooperative multilateral engagement between large multinational groups that are willing to engage actively and transparently and tax administrations in jurisdictions where the MNE groups have business activities.

The handbook includes a detailed description of each stage of the ICAP process, the documentation and information an MNE group participating in ICAP will provide, the level of comfort they may achieve as a result of participation in the programme, and a comparison of ICAP with other possible routes to greater tax certainty.

For more information please refer to the handbook.

OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors

Ahead of the G20 virtual meeting (March 12-14, 2021), the OECD provided an update on the progress being made to address the tax challenges arising from the digitalisation of the economy, as well as on the other G20 tax deliverables (i.e. tax transparency, implementation of the BEPS measures and capacity building to support developing countries), which continue to produce successful results. No further jurisdictions have received a non-compliant rating in the Exchange of Information on Request (EOIR) reviews made since the previous report (October 2020), when five jurisdictions were reported to had failed to comply (Dominica, Niue, Sint Maarten and Trinidad and Tobago and Anguilla).

For more information please refer to the OECD’s report.

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Multilateral Convention developments

Croatia and Malaysia deposited their instruments of ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) on February 18, 2021. For these two jurisdictions, the MLI will enter into force on June 1, 2021.

The total number of jurisdictions which have ratified, accepted or approved the MLI now stands at 63.

The MLI became effective on January 1, 2021 for approximately 650 treaties concluded among the 63 jurisdictions. See the full list of the signatories and parties to the MLI provided by the Organisation for Economic Cooperation and Development (OECD), as of February 18, 2021.

Peer review process for BEPS Action 5 (transparency framework)

On February 22, 2021, the OECD approved the process for the BEPS Action 5 peer review of the transparency framework for the years 2021 to 2025. This includes enhanced Terms of Reference for assessing the implementation of the minimum standard and a streamlined Methodology, adopting a risk-based approach towards the peer reviews.

For more information please refer to OECD's release.

United Nation

Consultation on possible changes to Model Treaty

The United Nation Department of Economic and Social Affairs has published for consultation a Discussion Draft on "Possible Changes to the United Nations Model Double Taxation Convention Between Developed and Developing Countries Concerning Inclusion of software payments in the definition of royalties", which includes a proposed revision to the definition of "royalties" and a draft Commentary on the proposed definition.

The consultation is focused on, *inter alia*:

- whether the description of "software" in the Commentary to article 12 is (a) consistent with current business practice and (b) appropriate for use as a definition in this context; and
- whether paragraphs 16 and 17 of the proposed UN Commentary adequately distinguish between goods that constitute "computers" and those that are not "computers", notwithstanding that they incorporate software to execute their functions or provide some degree of connectivity.

Comments are due by March 16, 2021 by email to taxcommittee@un.org in Word format.

For more information please refer to the Discussion Draft.

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Local Law and Regulations

Belgium

Law introducing annual tax on securities accounts published

On February 25, 2021, the Belgian law introducing a new annual tax on securities accounts ("solidarity contribution") was published in the Official Gazette. The tax applies on the average value of the taxable financial instruments (certain exemptions apply) on that securities account, if that average value exceeds EUR 1 million. For more details please refer to KPMG's TaxNewsFlash and E-news Issue 123 and Issue 126.

The Law entered into force the day after its publication (i.e. on February 26, 2021), although anti-abuse provisions apply retroactively from October 30, 2020.

Plans for extending COVID-19 support measures

Belgium's Federal Public Service – Finance announced that the Ministry of Finance is planning to further extend certain measures related to Covid-19 support by three months from March 31, 2021 to June 30, 2021, including:

- a 15 percent reduced withholding tax for temporary unemployment, and
- 30 percent tax cut for landlords that forgo rent for the months of March, April, and May 2021, for tenants that were forced to shut down due to Covid-19-relatedmeasures. A maximum of EUR 5,000 per month per rental contract and a maximum of EUR 45,000 per lessor may be taken as a non-refundable tax credit (for corporate income purposes).

Cyprus

Updated guideless on tax residence and permanent establishment exposures (COVID-19)

Cyprus issued updated guidance to address the impact of travel restrictions due to COVID-19. The guidance extends the applicability of previous provisions – which clarified the tax treatment of remote work for permanent establishment and dual tax residence purposes – for as long as restrictions continue to apply around the world.

Protocol to Tax Treaty with Germany signed

On February 19, 2021, the Cyprus Ministry of Finance announced the signing of an amending protocol to the 2011 income and capital tax treaty with Germany. The protocol provides for the implementation of the minimum BEPS standards for tax treaties.

Extension to the imposition of administrative fines for overdue submission of DAC6 reporting

On February 26, 2021, the Cypriot Tax Authorities announced that no penalties for late reporting will be imposed provided that reportable cross-border arrangements are filed by June 30, 2021.

The penalty relief will apply with respect to the 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);

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- between January 1, 2021 and May 30, 2021.

Germany

Guidance on simplified procedure for tax exemption on remuneration for intellectual property registered in Germany

Under German tax law, in specific cases of intellectual property (IP) structures, German tax might be triggered by a licensing of the IP or in case of a gain recognition event (e.g. sale, merger), even though no obvious German nexus might be triggered. In a letter issued on November 6, 2020, the German Ministry of Finance officially commented that the registration of a transferred right in a domestic register is sufficient to trigger tax obligations – for more details see E-news Issue 123. A draft law proposed the change of this rule, but it is yet to be adopted.

On February 11, 2021, the German Ministry of Finance issued a simplification rule applicable for a limited period, under which no tax is to be withheld if certain conditions are met. The simplification rule covers cases which are subject to non-resident tax liability and withholding tax solely on the basis of entry in a domestic register and for which, on account of an income tax treaty, no German tax liability ultimately arises. No other domestic nexus (use of the rights in a domestic permanent establishment) may exist.

For more information please refer to KPMG's Tax Newsflash.

Legislative proposal to amend the tax loss carry back mechanism

On February 9, 2021, the German governing coalition's parliamentary groups submitted a legislation proposal aimed at providing tax relief and economic assistance in response COVID-19.

One of the key points of the proposed act includes changes to the tax loss carryback mechanism for income and corporation tax. The tax loss carryback would be increased to EUR 10 million and EUR 20 million for joint assessments. The increase applies only for 2020 and 2021 (that is, for loss carrybacks from 2021 to 2020 and from 2020 to 2019). From 2022 tax assessment periods onwards, the upper limits will return to the previously applicable amounts of EUR 1 million EUR 2 million (for join assessments).

For more information please refer to KPMG's Tax Newsflash.

Ireland

Updated guidance on transfer pricing

On February 24, 2021, Ireland's Revenue released updated transfer pricing guidance, which takes into account the significant changes brought by Finance Act 2019 to the Irish transfer pricing rules. For more details on the new rules, effective for accounting periods commencing on or after 1 January 2020 please refer to KPMG's TaxNewsFlash.

For additional information please refer to the Tax and Duty Manual Part 35A-01-01.

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Malta

Guidelines on consolidated group rules

On February 19, 2021, Malta's Commissioner for Revenue published updates to the guidelines on consolidated group rules. Changes include, *inter alia*:

- clarifications regarding the calculation of income tax due by the principal taxpayer;
- clarifications on the requirement of consolidated audited accounts.

For additional information please refer to the updated guidelines.

Moldova

Moldova joins the CIS exchange of information agreement

On February 24, 2021, Moldova acceded to the amending protocol to the Commonwealth of Independent States (CIS) Mutual Assistance Agreement. The protocol includes amendments regarding the electronic exchange of information for tax purposes and was signed on November 2, 2018 by Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Uzbekistan, and by Belarus on October 2, 2020. Turkmenistan and Ukraine have not yet acceded to the protocol.

Netherlands

Update on tax treaty negotiations with Russia

According to reports, negotiations between Russia and the Netherlands for amendments to the existing income tax treaty between the two countries have again reached an impasse. In August 2020, the Russian Ministry of Finance indicated its desire to amend certain provisions of the income tax treaty — specifically for an increase in the maximum withholding tax rate on dividends and interest payments. For more details see E-news Issue 123.

It has been reported that the process to terminate the current treaty was initiated by Russian Ministry of Finance and that the Netherlands, on the other hand, is still willing to continue negotiations.

Seychelles continues efforts to be removed from the EU list of non-cooperative jurisdictions

Seychelles announced tax reforms aimed at enabling the country’s removal from the EU list of non-cooperative jurisdictions. On December 28, 2020, a law was approved which seeks to refine to Seychelles territorial tax system and achieve compliance with EU rules. In addition, Seychelles continues to address the concerns of the Global Forum on Transparency and Exchange of Information for Tax Purposes – the jurisdiction received a "Partially Compliant" overall rating in 2020.

In order to be removed from the list, the country would have to at least amend its harmful tax regime above, as well as to receive a “Largely Compliant” rating.

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Slovenia

Clarification on tax treatment of aid received

The Slovenian government clarified that aid received in response to the Covid-19 pandemic is considered taxable income and must be reported according to accounting rules. For corporate income tax returns in particular, this includes social security contribution subsidies (exemptions), partial reimbursement of uncovered fixed costs, reimbursement of wage compensation for workers, part-time work subsidies, and the crisis allowance.

South Africa

Proposed changes in 2021 budget to include corporate tax reduction and amended anti-avoidance provisions

South Africa's Minister of Finance presented the budget for 2021 on February 24, 2021. Proposed changes include, *inter alia*:

- a corporate tax reduction to 27 percent (from the current 28 percent) for years of assessment beginning on or after April 1, 2022;
- reduced tax incentives such as a limitation on interest deductions and fewer assessed loss offsets;
- amended hybrid debt anti-avoidance rules;
- amended controlled foreign company (CFC) anti-diversionary rules;
- a unilateral approach to the taxation of digital services providers if a multilateral approach fails;
- increased rate of carbon tax.

For more details please refer to KPMG's TaxNewsFlash.

Ukraine

Country-by-Country reporting enters into force

Ukraine's Ministry of Finance approved the Order that establishes the procedures for Ukraine's Country-by-Country (CbC) reporting requirements.

Under the new rules, taxpayers will have to submit their first reports for the fiscal year that ends in 2021, but not earlier than the year in which Ukraine joined the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports.

For more details please refer to a press release.

United Kingdom

Policy paper on reporting rules for digital platforms

On March 3, 2021, HMRC published a policy paper based on the OECD's "Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy".

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The document states the UK's intention to introduce certain reporting requirements for digital platforms, which may be required to disclose to HMRC the income derived by sellers of services on their platforms. HMRC will then exchange the information with the other participating tax authorities for the jurisdictions where the sellers are tax resident.

The regulations will be subject to consultation during the summer of 2021, before they take effect and are not expected to come into force before January 1, 2023, with reporting not due until January 2024.

Repeal of provisions relating to the Interest and Royalties Directive

On March 3, 2021, HMRC published a policy paper introducing a measure that will repeal the EU Interest and Royalties Directive implementing legislation.

According to the measure, EU resident companies will cease to benefit from the most favorable treatment of UK withholding tax exemption, and the UK's ability to withhold tax on cross-border payments of annual interest and royalties will be governed solely by the reciprocal obligations in double taxation agreements.

The measure applies to payments of interest and royalties made on or after June 1, 2021.

KPMG Insights

Global Indirect Tax updates

With the indirect tax landscape taking on an increasingly important role in the new reality for tax leaders, our indirect tax professionals are delighted to invite you to the **2021 KPMG Virtual Global Indirect Tax Conference**. The conference will take place from 23 to 25 March 2021 and will give you the opportunity to learn from, debate and contribute to dynamic plenary sessions, industry-based breakout sessions, and meetings with your local KPMG professionals. For more details and registration, click here.

KPMG's Global Indirect Tax Services has conducted a bi-annual **benchmark survey** designed to bring insights from a broad cross spectrum of international businesses about the challenges and opportunities associated with the effective management of indirect tax. The most recent results can be found here. If you wish to participate to the 2021 benchmarking survey click here.

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

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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 (updated February 23, 2021). 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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Key links

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