E-News from KPMG's EU Tax Centre

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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 mitigation of a discriminatory regime

On March 18, 2021, the Court of Justice of the European Union (CJEU) rendered its decision in *MK v Autoridade Tributária e Aduaneira* (C-388/19) concerning the compatibility with EU law of the Portuguese tax on capital gains on immovable property realized by a non-resident taxpayer.

The case involved a French resident individual, who realized a capital gain on the sale of Portuguese real estate. The Portuguese tax law provides for a different tax treatment of capitals gain on real estate depending on the country where the seller is resident, i.e. only 50 percent of capital gains from real estate made by persons resident in Portugal is taken into account in determining the taxable amount and a tax rate per bracket is applied on this amount, while the same capital gains, if realized by non-resident taxpayer, are taxed in full at a flat rate of 28 percent. Following a previous decision of the CJEU (the *Hollman v. Fazenda Publica* case, C-443/06), the Portuguese tax regime was amended in order to give residents of other EU Member States the choice between opting to be taxed either as a resident or as a non-resident.

The Portuguese tax authority issued to the French taxpayer a notice of assessment, applying the tax regime for non-residents and, thus, denying the 50 percent reduction of the taxable base granted to resident taxpayers, since the foreign taxpayer did not opt for being taxed in the same way as a resident. The French individual challenged this position and argued that the Portuguese tax rules applicable to non-residents breach the free movement of capital under Article 63 of the Treaty on the Functioning of the EU (TFEU). The Portuguese Tax Court decided to refer to the CJEU the question of whether the Portuguese capital gain tax treatment, to the extent that it allows a non-resident to make the election to be treated as a resident of Portugal, is in line with the free movement of capital.

In its decision, the Court did not endorse the AG's opinion and noted that:

- despite the additional solidarity surcharge, persons resident in Portugal are systematically taxed at a lower effective tax rate than non-residents. The Court held that this difference in treatment continues to represent a restriction on the free movement of capital; and
- simply giving non-residents the choice to be treated as residents is not sufficient to make the restriction compatible with the EU law.

For more details please refer to KPMG's EU Tax Centre ETF 446.

CJEU decision on the obligation of a Member State to transpose a directive

On March 17, 2021, the CJEU published its decision in the case C-64/20, on the obligation of a court of a Member State to exercise the power conferred on it by national law to declare that that Member State has failed to transpose correctly a directive.

The case concerned an Irish native speaker resident in Ireland, who claimed that the information accompanying veterinary medicinal products was written exclusively in English and not, as required by EU Directive 2001/82, in the two official languages in Ireland (i.e. Irish Gaelic and English). The Irish High Court agreed that the disputed national legislation did not comply with the provisions of the EU Directive, but considered whether, notwithstanding the infringement of EU law, it had a discretion that permitted it not to grant the remedy sought. In this particular case, in light of the entry into force of an EU Regulation, in practice, the applicant would obtain only a limited and temporary benefit from any amendment to the national law to comply with the EU Directive.

In its decision, the CJEU recalled that the obligation on Member States to achieve the result envisaged by a directive and their duty to take all appropriate measures is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.

The CJEU further noted that the Irish High Court, in so far as it had found that the EU Directive was incorrectly transposed, is required to take all the appropriate measures to ensure that the result prescribed by that directive is achieved. The fact that the Irish legislation is already compatible with an EU regulation that will apply with effect from a later date cannot call into question the finding that current legislation is incompatible with EU law before that date or, a fortiori, justify such incompatibility.

In light of the above, the Court concluded that Article 288 TFEU precludes a national court of a Member State from disregarding the obligation imposed on that Member State to transpose a directive on the ground that transposition is purportedly disproportionate as it might prove costly or serve no purpose on account of the forthcoming application of a regulation intended to replace that directive.

Infringement Procedures and CJEU Referrals

The United Kingdom referred to the CJEU for failure to fully recover illegal State aid in Gibraltar

On March 19, 2021, the European Commission decided to refer the UK to the CJEU for failing to fully recover illegal State aid in Gibraltar.

According to a decision issued by the European Commission on December 19, 2018, Gibraltar's corporate income tax exemption scheme for interest and royalties (applicable between January 1, 2011 and June 30, 2013 and December 31, 2013, respectively) represented a selective tax treatment unduly favoring a set of multinationals, and was in breach of EU State aid rules. In addition, the European Commission concluded that five individual rulings granted by the Gibraltar tax authorities (out of a total 165 reviewed) involved illegal State aid. These five rulings concerned the tax treatment of income generated by Dutch limited partnerships.

Gibraltar was required to recover the aid from companies that benefitted from the illegal State aid. Based on the European Commission's estimates, the amounts to be recovered amounted to up to EUR 100 million in total – see KPMG's EU Tax Centre ETF 390.

The European Commission notes that, since the decision was issued, Gibraltar has only completed the recovery of the State aid from two of the four beneficiaries, and the recovered amount represents less than 20 percent of the total amount to be repaid. In accordance with the Agreement on the withdrawal of the UK from the EU, the Commission is allowed to bring the UK to the CJEU for failing to implement decisions taken before the end of the transition period (i.e. end of December 2020). Based on these facts, the Commissions decided to refer the UK to the CJEU.

For more information please refer to European Commissions' press release.

EU Institutions

EUROPEAN COMMISSION

Estimated revenues brought by the EU digital levy

The European Commission was requested by a member of the European Parliament to provide additional clarifications on the latest estimates regarding the revenue to be generated by an EU digital levy.

The European Commission noted that they are currently working on the design of the digital levy proposal and therefore the revenue can not be estimated at this stage. The Commission also confirmed that the design of the levy will “ensure co-existence with the prospective outcome of the OECD negotiations”.

European Commission provides clarifications on tackling harmful tax competition within the EU

A member of the European Parliament asked about the actions the European Commission plans to take against Member States involved in aggressive tax competition.

The European Commission response highlighted that the institution shares the European Parliament’s view regarding the need to improve tax good governance across Member States. Whilst the EU list of non-cooperative jurisdictions for tax purposes is tailored for non-EU jurisdictions, the EU has several tools to ensure that Member States comply with good governance principles. Such tools include the Directive on administrative cooperation in the field of taxation (the DAC) and its subsequent revisions, the EU Anti-Tax Avoidance Directive, and the Code of Conduct on business taxation. Additionally, in 2020, the Commission adopted recommendations on aggressive tax planning for six Member States, and plans to monitor their implementation in the context of the Recovery and Resilience Facility.

When asked about potential penalties against Member States engaged in harmful tax competition, the European Commission noted that infringement proceedings could be initiated against EU jurisdictions not complying with decisions issued by the Code of Conduct group.

Clarifications regarding fiscal State aid cases

When asked about legal fees and other costs related to cases lost by the European Commission in the field of fiscal State aid, the Commission provided an overview of recent case-law in this area. According to the overview, over the last five years, the Commission defended fifteen of its decisions in the area of fiscal State aid before the General Court / the CJEU. Out of these cases, the Commission’s decisions were definitively upheld in five cases, while two decisions were definitively annulled. The remaining eight cases are still pending.

COUNCIL OF THE EU

Legislation on reporting requirements for digital businesses published (DAC7)

On March 22, 2021, the Council of the European Union adopted Council Directive (EU) 2021/514 (DAC7). The directive was published in the Official Journal of the EU on March 25, hence will enter into force on April 14, 2021.

The new provisions will allow Member States' tax authorities to collect and automatically exchange information on income earned by sellers on digital platforms, as well as on platform fees and commissions incurred. Member States have until December 31, 2022 to transpose the amendments into national law . The Directive will apply from January 1, 2023 throughout the EU Member States and the first reporting of data will be required by January 31, 2024.

For more information please refer to KPMG's EU Tax Centre ETF 447 or the Council's press release.

EUROPEAN PARLIAMENT

European Parliament ECON committee vote on digital economy resolution

On March 23, 2021, the European Parliament's Committee on Economic and Monetary Affairs (ECON) adopted a motion for an European Parliament resolution on "Digital Taxation: OECD negotiations, tax residency of digital companies and a possible European digital tax". The report sets out the European Parliament's views ahead of the final negotiations on a global reform within the OECD/G20 Inclusive Framework.

Whilst welcoming the efforts undertaken at G20/OECD level, the resolution calls for a swift global agreement, by mid-2021, and expresses support for a holistic solution, where both Pillars are adopted. The report further notes that, irrespective of the progress of negotiations at G20/OECD level, the EU should be ready to roll out by the end of 2021 its own solutions for tackling the challenges of the digitalized economy. Any solution proposed by the EU should consider compatibility with the G20/OECD BEPS 2.0 initiatives.

The European Parliament is expected to cast their vote on the draft motion in the plenary session scheduled for April 24, 2021.

For more information please refer to KPMG's EU Tax Centre ETF 447 or the Parliament's press release.

FISC – report on creating an European tax system in the post-COVID economy

On March 22, 2021, the European Parliament Subcommittee on Tax Matters (FISC) discussed the draft own-initiative report on "Creating an economically, socially and environmentally sustainable European tax system in the post-COVID environment".

The draft report highlights the challenges that Member States' tax systems are facing, including the need for large public investments to sustain economic recovery and the green transition, as well as the reduction in the working-age population and increased tax competition. The author (Gruffat Claude – Greens/ALE) notes that the coronavirus (COVID-19) pandemic showed that the current reliance on labor income taxes and social contributions is not sustainable. In his view, the post COVID-19 recovery period represents a good opportunity to reform the tax system.

The Commission is asked to design a tax framework that would accomplish three purposes: ecological transition, reduce social inequalities and restore business competitiveness. For this purpose, the report calls for a holistic tax reform, under which taxation is shifted from labor and income, to taxing pollution, capital and wealth. The Commission should be tasked with publishing a roadmap and a toolkit to guide Member States in achieving the tax reform post COVID-19.

The draft text will be subject to negotiations between the members of the European Parliament, including a debate and vote on future amendments in the FISC meeting on May 25, 2021, and a final vote during the plenary session in the third week of June.

For more details please refer to the European Parliament's press release.

Draft report on the effectiveness of DAC

Findings on the DAC implementation and its effectiveness within the European Union were released by Sven Giegold - Member of European Parliament (Germany, Greens).

In Mr. Giegold's view, whilst DAC has been continuously improved to widen the scope of the exchange of information (EOI), the directive requires further refinement as only limited data is exchanged with respect to certain categories of income and assets (e.g. real estate, trusts, shares in companies below the 25 percent ownership threshold, certain forms of capital gains, crypto assets).

Mr. Giegold also notes that in his view, the data exchanged is underused due to a lack of trained staff and effective IT infrastructure in the national tax authorities of EU Member States. Further inefficiencies arise from a lack of control regarding the quality of the information exchanged, as well as from "poor implementation" of EU and international anti-money laundering rules. The author also concludes that the use of different standards – FATCA is specifically mentioned, leads to avoidable bureaucracy.

The report suggests several actions to improve the efficiency of the EOI within the EU, including broadening the scope of the directive to ensure a consistent exchange of all tax-relevant information, increased tax administration capacities, the use of exchanged data for other law enforcement purposes, without any cross-border authorization and coordination with the OECD to harmonize the US FATCA rules with the EU and the OECD CRS standard.

The author is asking interested stakeholders to provide feedback and suggestions on the report by April 11. Suggestions received will be used to further refine the document, which will also include other amendments recommended by the shadow rapporteurs. A common draft document will be discussed in the Committee on Economic and Monetary Affairs on May 27, and a plenary vote will take place in June.

For more details please refer to the draft report or to Mr. Giegold's blog article.

OECD and other International Institutions

OECD

Multilateral Convention developments

Greece and Hungary deposited their instruments of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) on March 30 and March 25, 2021, respectively. For these two jurisdictions, the MLI will enter into force on July 1, 2021.

See the full list of the signatories and parties to the MLI and the Arbitration Profiles provided by (OECD), as of March 30, 2021.

In addition, on March 25, 2021, the Organisation for Economic Cooperation and Development (OECD), in its capacity as depository of the MLI, published Arbitration Profiles of 30 jurisdictions applying Part VI of the MLI, which allows jurisdictions choosing to apply it to adopt mandatory binding arbitration for the resolution of tax treaty disputes.

Consultation on Proposed Changes to Commentaries on Article 9 of the MTC

On March 29, 2021, the OECD announced a consultation on proposed changes to the commentaries on Article 9 (Associated Enterprises) and related articles of the Model Tax Convention (MTC). Article 9 of the MTC deals with the taxation of transactions between associated enterprises and represent the basis of the OECD transfer pricing rules. Working Party 1 on Tax Conventions and Related Questions, in consultation with Working Party 6 and the Forum on Tax Administration's MAP Forum, has recently undertaken work on the Commentary on Article 9 to clarify its application, especially in respect of domestic laws on interest deductibility.

Interested parties are invited to send their comments before May 28, 2021.

For more information please refer to the OECD's announcement.

Updated List of Tax Administrations Participating in the ICAP

The OECD updated the list of tax administrations participating in the International Compliance Assurance Programme (ICAP). The list includes tax administrations from 19 countries: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Russia, Singapore, Spain, United Kingdom and United States.

Announcement of first tax information exchanges under the Forum on Harmful Tax Practice's global standard on substantial activities

On March 31, 2021, the OECD announced that twelve no or only nominal tax jurisdictions (Anguilla, the Bahamas, Bahrain, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Turks and Caicos Islands, the United Arab Emirates) began their first tax information exchanges under the global standard on substantial activities of the Forum on Harmful Tax Practice.

The new annual exchanges cover information on the identity, activities and ownership chain of entities established in no or only nominal tax jurisdictions, that are either non-compliant with substance requirements or engage in intellectual property or other high-risk activities.

For more information please refer to the OECD's announcement.

Local Law and Regulations

Cyprus

DAC6 update

On March 18, 2021, the Cyprus Parliament approved the law transposing the EU Directive on mandatory disclosure requirements (DAC6) into domestic legislation. Guidance notes – providing clarifications on the interpretation of key terms and provisions of the law, are expected to be issued simultaneously with the publication of the law.

Italy

Digital services tax update

On March 23, 2021, the Italian Tax Authorities published on their website Circular no. 3/2021 to clarify various aspects regarding the application and administration of the Italian digital services tax (DST). Key aspects include, *inter alia:*

- digital services within the scope of the DST and services falling outside its scope;
- details of calculation of taxable revenue and the proportion of that revenue deriving from services linked to the Italian territory;
- registration process, preparation of accounting documentation and submission of the DST return.

For more details please refer to KPMG's TaxNewsFlash.

Germany

Option to be treated as corporation – to be available for partnerships

The German Ministry of Finance introduced a draft law, under which tax transparent partnerships would be allowed to opt to be taxed as regular legal entities for corporate income tax purposes. The option would be available for both general (offene Handelsgesellschaft) and limited liability partnerships (Kommanditgesellschaft).

Anti-avoidance measures approved by the federal government

On March 24, 2021, the German federal government adopted a draft bill to implement the EU Anti-Tax Avoidance Directive (ATAD). Once approved by both the lower house of the parliament and the Federal Council, the following ATAD provisions will be transposed into domestic legislation: exit taxation, controlled foreign company rules and hybrid mismatches.

For more details please refer to KPMG's TaxNewsFlash.

DAC6 update

On March 29, 2021, the German Ministry of Finance published guidance providing information on the application of all relevant domestic implementation rules concerning DAC6. The guidance provides, inter alia, information on the scope and application of the hallmarks and contains illustrative examples in this respect.

Greece

Transfer pricing guidance

On March 10, 2021, the Greek authorities published a circular which includes general transfer pricing guidelines for dealing with the effects of the COVID-19. In particular, the Greek guidelines include guidance on:

- comparability analysis, including sources of supporting information, due diligence, the re-examination of previously used data, etc.;
- losses and allocation of COVID-19 specific costs, including with respect to limited risk entities, contractual terms and agreements, and extraordinary expenses due to the pandemic;
- consideration of the effects of government (assistance) programs for COVID-19; and
- impact of the COVID-19 pandemic on existing APAs and APAs under negotiation.

Ireland

Consultation on attribution of profits to branches of non-resident companies

The Irish authorities announced the launch of a public consultation on the application of the Authorized OECD Approach for the attribution of profits to branches of non-resident companies. The consultation period runs from March 16 to April 16, 2021.

Kuwait

Tax rules for foreign companies with income from franchise arrangements, license agreements

Kuwait imposes a tax on income earned from Kuwait in the form of license fees or royalties on rights to use trademarks, brand names, and other intellectual property. Accordingly, tax compliance requirements arise for foreign brand owners that have franchise arrangements in Kuwait and technology companies earning license fees from Kuwait.

For more details please refer to KPMG's TaxNewsFlash.

Netherlands

Conditional withholding tax on dividends paid to low tax jurisdictions

On March 25, 2021, the Dutch Ministry of Finance submitted a draft bill aiming to introduce a conditional withholding tax on dividends paid to low tax jurisdictions.

The conditional withholding tax would apply on dividend payments to jurisdictions with a corporate tax rate below 9 percent and jurisdictions listed on the EU list of non-cooperative jurisdictions. If approved, the tax would become effective starting January 1, 2024.

Saudi Arabia

Tax incentives for entities in logistics bonded zones

Saudi Arabia announced tax and customs incentives applicable for integrated logistics bonded zones (areas benefiting from special rules, set up with the purpose of translating the Saudi Arabia Vision 2030 into reality by leveraging the country's strategic location as the hub connecting three continents). Incentives include zero-rated corporate, income and withholding tax on certain payments, as well as 100 percent suspension of customs and import restrictions.

For more details please refer to KPMG's TaxNewsFlash.

Spain

Financial transaction tax update

On March 26, 2021, the Spanish Tax Authorities announced on their website that the first filing and payment deadlines of the Spanish financial transaction tax (FTT) have been further postponed to June 10-20, 2021. The delay is aimed at giving taxpayers sufficient time for technical and functional adaptations to the new tax.

Sweden

Draft bill implementing ATAD reverse hybrid mismatch provisions

On March 16, 2021, a draft bill for the implementation of anti-reverse hybrid mismatch rules as per ATAD was submitted to the Swedish Parliament. The bill includes provisions to extend the tax liability of limited taxpayers to include income from a Swedish company if the limited taxpayer is (i) not taxed on the income due to differing classification for tax purposes of the company, and (ii) considered part of a community of interest with the Swedish company (i.e. associated/related enterprises). The new provisions are proposed to enter into force on July 1, 2021.

Termination of the current Tax Treaties with Portugal and Greece

On March 23, 2021, the Swedish Ministry of Finance submitted two draft bills to the Parliament to terminate the income and capital tax treaties with Greece and Portugal, respectively.

The Ministry states that the treaties above are not in line with the current treaty policy of Sweden, as they grant the state of residence exclusive taxing right over private pensions (article 18), which is thought to allow individuals moving from Sweden to these countries to pay very low or no tax.

It is proposed that the two treaties should be terminated by December 31, 2021.

United Kingdom

Enhanced capital allowances for computer software

Finance Bill 2021 includes a 130 percent super deduction for investments in computer software, including internally developed software. This relief applies equally to computer software, as well as to physical assets, including costs accounted for as intangible fixed assets. The key criteria for the super-deduction are:

- it is only available for expenditure under contracts entered into from March 3, 2021;
- the expenditure must be incurred between April 1, 2021 and March 31, 2023.

The expenditure must be capital in nature for tax purposes.

For more information please refer to KPMG's TaxNewsflash.

Proposed changes to the hybrid mismatch rule

Finance Bill 2021 includes several changes to the UK hybrid mismatch rules, including:

- a new concept of inclusion/no deduction income, which can be treated as dual-inclusion income when determining to what extent a double deduction mismatch should be counteracted;
- members of a UK group relief group may be able to match dual-inclusion income and double deductions within a group, so that only the net group position is counteracted;
- the rules regarding illegitimate overseas deductions will be amended so that they will only disallow UK relief where the relevant double deduction is utilized for overseas tax purposes by an entity other than the UK corporation tax (CT) paying company or its investor(s);
- the definition of 'foreign tax' will be amended to clarify that payments included in a US global intangible low-taxed income (GILTI) charge will not count as 'included' for the purposes of determining whether the payment gives rise to a mismatch;
- an entity will only be regarded as a 'hybrid entity' if it has this status by virtue of the way it is treated for tax purposes in its own territory and that of its investors (rather than in any territory);
- new rules will be introduced that may prevent hybrid counteractions from arising in certain cases where the recipient of a payment is (i) a commercial lender or sub-five percent shareholder, (ii) a Qualifying Institutional Investor, or (iii) a sub-10 percent participant in a transparent fund;
- the imported mismatch rules can deny a UK deduction where a mismatch arises outside the UK as part of wider arrangements. These rules will be amended, in particular so that they (i) operate proportionately where the UK payment is less than the relevant overseas payment (either naturally or by operation of the UK transfer pricing rules) and (ii) will not apply where a relevant overseas territory has hybrid mismatch rules that are equivalent to the UK regime as a whole. As a result, any current counteraction required may be reduced or eliminated;
- amendments will be made to help ensure loan releases do not become taxable for the borrower as a result of a hybrid counteraction in certain circumstances where a credit arising from the release would have been exempted for UK tax purposes had it been recognized in the P&L.

For more information please refer to KPMG's TaxNewsflash.

Country-by-Country reporting schema updated

The country-by-country (CbC) reporting schema has been updated to XML 2.0 for submissions to HM Revenue & Customs (HMRC). All CbC reports submitted to HMRC on or after January 1, 2021 must use the new 2.0 XML format.

For more information on the key changes, please refer to the KPMG's TaxNewsflash.

Consultation on transfer pricing documentation requirements

On March 23, 2021, HMRC launched a consultation on the UK's transfer pricing documentation requirements, requesting possible options and design ideas that could benefit UK business and HMRC. The consultation is open for comments until June 1, 2021.

Notably, the introduction of Master and Local file requirements is being considered and the consultation is seeking views on the introduction of a mandatory requirement to provide HMRC with a copy of the Master file upon request and to keep (and produce on request) a Local file.

For more information on the key changes, please refer to the KPMG's TaxNewsflash.

KPMG Insights

Future of Tax webcasts

Visit the Future of Tax & Legal Webcast Series page for webcasts currently open for registration, browse upcoming topics that will be covered and watch any webcasts replays you might have missed.

Registration now open

Towards an effective Carbon Border Adjustment Mechanism
26 April (9:00 EST) | Register
EU Financial Services Tax perspectives
28 April (9:00 EST) | Register

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 (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

- Visit our website for earlier editions

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