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E-News from the EU Tax Centre

Issue 132 – May 14, 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 the taxation of income received by Finnish tax resident individuals from Luxembourg SICAVs

On April 29, 2021, the Court of Justice of the European Union ('CJEU' or 'Court') rendered its decision in the E v. Veronsaajien oikeudenvalvontayksikkö case (C-480/19), concerning the compatibility with the EU law of the Finnish tax treatment of profits distributed to a Finnish tax resident individual by a Luxembourg SICAV - incorporated as a legal entity, regulated as an Undertaking for the Collective Investment of Transferable Securities (UCITS) and tax exempt in Luxembourg.

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Under Finnish rules, UCITS may only be constituted as investment funds (i.e. in a contractual form) and profits derived through them are taxed as capital income at a flat rate (maximum 34%). Instead, profits distributed by foreign UCITS, having a corporate form and being tax-exempt, are re-classified as employment income in the hands of Finish individuals and subject to progressive tax rates (maximum rate of 50%). In the case at hand, this system lead to the income received from the tax-exempt Luxembourg SICAV to be taxed at a higher level than that which would have applied had the income been derived through a Finnish UCITS. The taxpayer challenged this assessment on the grounds that it was contrary to the free movement of capital.

The case was brought before the Finnish Supreme Administrative Court that decided to refer to the issue to the CJEU.

In its decision, the CJEU held that profits distributed by a Luxembourg SICAV are treated more disadvantageously than profits distributed by a Finnish UCITS in the hands of a Finnish individual investor, simply because of the different legal form of the Luxembourg SICAV and the Finnish UCITS. Furthermore, in line with its previous case law, the Court recalled that a difference in treatment may be justified only if it concerns situations that are not objectively comparable. In this regard, the CJEU found that foreign UCITS should be considered as being in a comparable situation to that of Finnish UCITS since both categories are tax-exempt and their profits are taxed in the hands of the investors only.

Therefore, the Court concluded that the Finnish tax regime is not compatible with EU law and, consequently, profits distributed by a Luxembourg SICAV to a Finnish resident individual should be treated as capital income in the same way as profits distributed by Finnish investment funds.

For more details please refer to an alert prepared by the KPMG member firm in Finland.

AG Opinion on Portuguese tax on dividends received by foreign UCITS

On May 6, 2021, Advocate General (AG) Kokott of the CJEU published her Opinion in the *Allianzgi-Fonds Aevn v Autoridade Tributária e Aduaneira* case (C-545/19), concerning dividends paid by Portuguese companies to foreign undertakings for collective investment in transferable securities (UCITS). The case concerns a tax-exempt UCITS established in Germany, which received capital income in the form of dividends from investments in Portuguese entities.

In Portugal, dividends distributed by Portuguese entities to a UCITS set up under Portuguese law are exempt from corporate income tax (CIT) and are taxed at the level of the investors in the UCITS at the time of the distribution. However, since 2015, domestic UCITS are subject to a quarterly 'stamp duty' of 0.0125 percent, that is levied on the total net asset value of the UCITS (including, *inter alia,* unpaid dividends). On the other hand, foreign UCITS – to the extent that they are subject in their country of residence to a CIT rate lower than 60 percent of that applied in Portugal, are subject to a final withholding tax of 25 percent (that can be reduced under the double tax treaty in force).

Following a tax dispute between the German UCITS and the Portuguese tax authorities, the Portuguese tax court decided to refer to the CJEU the question of whether the tax regime is in line with EU law, namely the free movement of capital and the freedom to provide services.

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The AG examined the question from the perspective of the free movement of capital and noted that a restriction could exist if the application of the stamp duty would entail, in the present case, a significantly more favorable tax treatment of resident UCITS (compared to the tax treatment of non-residents UCITS). According to the AG, it is up to the referring court to assess whether such a discrimination exists.

Nonetheless, the AG recalled that a difference in treatment does not constitute a restriction on the free movement of capital if it concerns situations that are not objectively comparable. In the AG's opinion, nonresident UCITS are not in a comparable situation to resident UCITS because Portugal does not have the authority to tax foreign entities in the same way as it taxes Portuguese UCITS (i.e. to apply the stamp duty on the global net asset value of the foreign UCITS). Furthermore, the AG observed that, even if the CJEU would proceed on the assumption that the domestic and foreign UCITS are in a comparable situation, the difference in treatment would be justified by the need to preserve the balanced allocation of the power to impose taxes between the Member State, to avoid 'double non-taxation' in the context of efficient tax collection and to safeguard the coherence of the Portuguese tax system.

Therefore, the AG concluded that the Portuguese tax regime should not be found as discriminatory under EU law.

State Aid

General Court decision on Luxembourg tax rulings related to intra-group financing structures

On May 12, 2021 the General Court of the European Union issued its judgments in two cases (T-516/18 and T-525/18), concerning two sets of tax rulings granted by the Luxembourg tax authorities between 2008 and 2014 in connection with intra-group financing structures relating to the transfer of activities between companies of the taxpayer group resident in Luxembourg.

In short, the structures involved transactions between three companies – a holding company, a subsidiary and an intermediary, while under the tax rulings, only the subsidiary was taxed on a margin agreed with the Luxembourg tax administration.

The European Commission (EC) determined that the result of the structures approved by the tax administration was that almost all of the profits made by the subsidiaries established in Luxembourg were not taxed. The EC concluded that the tax rulings constituted illegal State aid that was incompatible with the internal Market (that must be recovered from the taxpayers by the Luxembourg authorities) – see ETF 372. The taxpayers and the Luxembourg tax authorities initiated a judicial action before the General Court of the EU.

In its May 12 judgment, the General Court approved the EC's approach that when presented with a complex intra-group financing structure, this requires examining the "economic and fiscal reality"— rather than a formalistic approach that considered, in isolation, each of the transactions under the structure. The Court considers that the Commission was entitled to determine that the Luxembourg tax administration derogated from the reference framework (the availability of the

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participation exemption only with respect to income that was not deducted from the taxable income of subsidiaries) by confirming the exemption of participations which correspond, from an economic perspective, to an amount that was deducted as expenses at the level of the subsidiaries. The General Court found that the Commission did not err in law by looking at the combined effect of the deductibility of income at the level of a subsidiary and the subsequent exemption of that income at the level of its parent company.

As regards the Commission's findings regarding the selectivity of the contested tax rulings in the light of national provisions relating to abuse of law, the General Court noted that - in so far as the Commission ascertained that the criteria laid down by Luxembourg law to find that there has been an abuse of law were met, it cannot be disputed that the taxpayer group received preferential tax treatment owing to the non-application of those provisions. The Court therefore held that the Commission demonstrated to the requisite legal standard a derogation from the reference framework comprising the provision relating to abuse of law.

Read TaxNewsFlash for further details.

General Court decision on Luxembourg tax ruling related to 'arm's length' royalties

On May 12, 2021 the General Court of the European Union issued its judgments in two cases (T-816/17 and T-318/18 A), concerning a tax ruling granted by the Luxembourg tax authorities in 2003, with respect to the method for calculation of the 'arm's length' royalty to be paid under an intra-group license agreement.

In its 2017 decision, the European Commission found that the tax ruling constituted State aid which is incompatible with the internal market. Essentially, the Commission considering that the royalty calculated in accordance with the method endorsed in the tax ruling was too high and resulted in an artificial reduction of the tax base for corporate income tax purpose of the Luxemburgish paying entity. The European Commission had found that a series of errors as regards the choice and application of the method used to calculate the 'arm's length' level of the royalty payment (the transactional net margin method – TNMM) - see ETF 339.

The General Court noted that, in examining the method of calculating an integrated company's taxable income endorsed by a tax ruling, the Commission can find an advantage only if it demonstrates that the methodological errors which, in its view, affect the pricing of intra-group transactions do not allow a reliable approximation of an arm's length outcome to be reached, but rather lead to a reduction in the taxable profit of the company concerned (i.e. an advantage) compared with the tax burden resulting from the application of normal taxation rules.

The Court then examined the Commission's analysis, found it to be incorrect and considered that the Commission did not establish the existence of an advantage and that it erred in its evaluation of the remuneration that could be expected in the light of the arm's length principle – according to the Court, the Commission applied a profit mark-up that is inappropriate in the present case. The Court therefore generally upheld the arguments contesting both the primary and subsidiary findings of an advantage and consequently annulled the contested decision in its entirety.

The judgment of the General Court provides clarifications as regards the scope of the EC's burden of proof in establishing the existence of an advantage when the level of taxable income of an integrated company belonging to a group is determined by the choice of transfer pricing

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method.

Read TaxNewsFlash for further details.

EU Institutions

EUROPEAN COMMISSION

Communication on business taxation expected May 18, 2021

Based on a recent draft agenda of the European Parliament's plenary session, a debate on the European Commission's Communication on business taxation for the 21st century will take place on May 18, 2021.

The Communication was initially announced for fall 2020 but was postponed several times and a public consultation seeking feedback from stakeholders took place earlier this year (the deadline for providing comments was April 1). The document is expected to set out the Commission's views on business taxation in the EU, its medium-term agenda in this area, and it will take stock of pending proposals, such as taxation of the digitalized economy and the common consolidated corporate tax base.

EUROPEAN PARLIAMENT

European Parliament approves digital economy resolution

On April 29, 2021, the European Parliament adopted its resolution on "Digital Taxation: OECD negotiations, tax residency of digital companies and a possible European digital tax". The document was first discussed in the Parliament's FISC Subcommittee – see E-news Issue 128.

The text of the resolution is consistent with the version approved by the Parliament's ECON Committee (see KPMG EU Tax Centre's ETF 447), updated based on relevant international developments since March 2021.

In summary, the document reiterates the European Parliament's (EP) views on the need for a swift global agreement on taxing the digitalized economy, in the broader context of the fight against base erosion and profit shifting and the perceived mismatch between taxation and value creation. However, regardless of the progress made at global level, members of the European Parliament (MEPs) are of the opinion that the EU must have a fallback plan and be prepared to go forward with its own proposal (by the end of 2021) on taxing the digitalized economy. In particular, MEPs call on the European Commission, as a first step, to consider introducing a temporary EU digital services tax as an EU own resource, which could then be rolled back at a later stage and replaced with the global solution.

For more details please refer to a KPMG TaxNewsFlash.

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FISC – reports on a European tax system in the post-COVID economy and on reforming the Code of Conduct Group

On May 25, 2021, the European Parliament Subcommittee on Tax Matters (FISC) will hold a public hearing on the digitalization of tax administrations and the opportunities brought by the use of tax technology in the fight against tax fraud, evasion and avoidance.

FISC Members will also exchange views on two draft own-initiative reports:

- "Reforming the EU policy on harmful tax practices” (including the reform of the Code of Conduct Group). The discussion was preceded by a public hearing attended by the Chair of the Code of Conduct Group and by tax policy experts - see E-news 131;
- “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. An initial draft was discussed on March 22, 2021 – see E-news 129 – and a final vote is expected during the European Parliament’s plenary session in the third week of June.

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

COUNCIL of the EU

EU-UK trade and cooperation agreement: Council adopts decision on conclusion

On April 29, 2021, the Council adopted its decision on the conclusion of the EU-Trade and Cooperation Agreement (“EU-UK Agreement”), which represents the last step for the EU in the ratification of the agreement – see KPMG’s EU Tax Centre ETF 438.

The EU-UK Agreement sets out the terms of the future cooperation between the two parties and has been applicable on a provisional basis starting January 1, 2021. Following the Council’s decision, the agreement entered into force on May 1, 2021.

The separate joint-declaration, re-affirming the parties’ commitment to countering harmful tax regimes and setting out the principles that would apply in this matter, was also published in the Official Journal of the EU.

For more details please refer to Council’s press release.

OECD and other International Institutions

OECD

Global Forum Secretariat launched the “Train the Trainer” pilot programme

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On April 30, 2021, the OECD's Global Forum launched the "Train the Trainer" project, which is designed to assist participating jurisdictions in providing local training to Competent Authority tax auditors and investigators. The programme aims at raising awareness on cross-border administrative assistance in tax matters, in particular the exchange of information on request, and building administrations' capacity to use these instruments effectively in their day-to-day work.

The project will kick off with a pilot organized for African developing countries.

For more details please refer to OECD's report.

United Nation

Committee of experts notes the decision not to include computer software payments in the definition of royalties

On April 26, 2021, the United Nations Committee of Experts on International Cooperation in Tax Matters published a note regarding the new Article 12B (the article was approved on April 20, 2021 and allows the source taxation of income from the rendering of automated digital service - see E-news 131).

Based on the note, a minority of members considered that Article 12 – on royalties – should allow for source state taxing rights even in cases where the user of computer software is not exploiting the copyright in the software. Since no agreement has been reached, it was decided to include a wording that could be used by countries in their treaties, should they wish.

For more details, please refer to the U.N.'s note.

Local Law and Regulations

Bahrain

New electronic filing requirement for economic substance returns

The Ministry of Industry, Commerce and Tourism of Bahrain issued a notice regarding economic substance returns. The economic substance rules in Bahrain apply to entities (corporations, branches, and partnerships) which conduct certain business activities (e.g. distribution and service centre, shipping, headquarters and holding company activities, leasing activities, intellectual property activities, banks, financing and insurance, etc.) – see E-news 116.

Based on the notice, the returns should be submitted via a recently launched International Tax Information Exchange System (ITIES) portal. Entities that have already submitted their 2020 economic substance returns manually (via email) would need to re-submit them using the new portal.

For more details please refer to a KPMG TaxNewsFlash.

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Denmark

Defensive measures against non-cooperative jurisdictions – published in the official gazette.

On May 4, 2021, the law introducing anti-avoidance rules against countries included on the EU list of non-cooperative jurisdictions was published in the Danish Official Gazette.

For more details please refer to E-news 131.

Public consultation on a draft law regarding ATAD-compliant CFC rules

The Danish government has launched a public consultation on proposed amendments to the current controlled foreign company (CFC) rules. Previous draft versions were discussed with the Parliament, but their implementation was delayed due to various concerns.

The current draft provide for a for a partial substance test in relation to the inclusion of other income from intangible assets as CFC income. The proposed changes aim to preclude the application of the partial substance test in cases where there is a substantial tax base erosion risk.

Finland

Finland announces tax policy measures to strengthen public finances

On April 29, 2021, the Finnish Ministry of Finance issued a press release announcing measures for the remaining part of its term and for the 2022–2025 General Government Fiscal Plan, aimed to strengthen employment and public finances.

Key tax policy measures would include:

- tax base protection measures, and
- changes to encourage investment and enhance competitiveness.

Germany

Draft bill on the modernization of the corporate tax law

The German Federal government published a draft bill for the modernization of the corporate tax law. Proposed changes include:

- an option under which partnerships could be taxed as corporations;
- tax deductibility of foreign exchange losses relating to shareholder loans;
- opening up the German Reorganisation Tax Act to transformations of corporations worldwide, in particular spin-offs / demergers of third-country companies and cross-border mergers. However, contributions and the exchange of shares would not be covered.

For more details please refer to a KPMG TaxNewsFlash.

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India

India sets thresholds for new significant economic presence / digital PE rules

On May 3, India's Central Board of Direct Taxes issued a notification on a new rule regarding thresholds used when determining a significant economic presence, for the purpose of attributing income in India.

The following thresholds are set:

- payment threshold: transactions involving goods, services or property carried out by a non-resident with any person in India, including data or software downloads in India, equivalent to INR 20 million (approximately EUR 225,000) or more (during the previous year); or
- user threshold: systematic and continuous soliciting of business activities / interact with 300,000 or more users in India.

The new rules will come into force from April 1, 2022.

Ireland

Ireland updates guidance on the taxation of REITs

Irish Revenue published eBrief No. 093/21 regarding updated guidance on taxation of real estate investment trusts (REITs). Amendments reflect the changes brought by Finance Act 2019, i.e. applying the "wholly and exclusively" test when calculating profits available for distribution and use of funds raised and disposal proceeds.

Jersey

Jersey publishes 2021 budget law

On April 30, 2021, the Jersey authorities published the 2021 budget law. Among others, the law includes a clarification that a dividend received out of the capital profits of a non-resident company is not chargeable to tax.

Netherlands

Beneficial ownership registration requirements for trusts

On April 26, 2021, the Dutch Ministry of Finance published draft legislation which would implement beneficial ownership registration requirements for trusts and similar legal arrangements.

Under the draft rules, all trusts and similar legal arrangements would be in scope, to the extent that the trustees reside or are established in the Netherlands or, if residing or established outside the EU, the trustee enters into a business relationship in the Netherlands or acquires real estate in the Netherlands on behalf of the trust.

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Slovenia

Proposals to introduce defensive measures against non-cooperative jurisdictions and ATAD's reverse-hybrid rule

On April 29, 2021, Slovenia's Ministry of Finance published for consultation several tax proposals, including:

- introducing an anti-hybrid rule for reverse hybrid mismatches. According to the proposal, a Slovenian person that is treated as tax transparent in Slovenia, but is considered non-tax-transparent in the investors' jurisdiction, would be deemed to be a Slovenian tax resident and therefore its income would be taxed in Slovenia;
- extending existing defensive measures against tax havens to countries on the EU list of non-cooperative jurisdictions for tax purposes. Current limitations are linked to a national list of countries where the general or average nominal corporate income tax rate is lower than 12.5 percent;
- introducing a new tax relief measure for investments dedicated to the digital and green transition. This new measure would establish a deduction of up to 40 percent of investments made per year in cloud computing, artificial intelligence, big data and environmentally-friendly technologies.

If approved, the proposals would generally apply from January 1, 2022.

South Africa

Interpretation notes for withholding tax on interest and royalties

On April 23, 2021, the South African Revenue Service published Interpretation Note 115 on withholding tax on interest and Interpretation Note 116 on withholding tax on royalties.

The Interpretation Notes provide a detailed overview of the relevant laws, the levy of withholding tax, exemptions from withholding tax, liabilities of payers and recipients, rules on payments and refunds, as well as several examples.

For more details please refer to Interpretation Note 116 on Withholding Tax on Royalties and to Interpretation Note 115 on Withholding Tax on Interest.

Turkey

Turkey Approves Increased Corporate Income Tax Rate for 2021 and 2022

On April 22, 2021, Turkey published Law No. 7316, which provides for several tax measures, including the increase of the standard corporate tax rate from 20 percent to 25 percent for the 2021 tax period and 23 percent for the 2022 tax period.

Ukraine

Guidance on exemption from advance tax payments on dividends

Ukraine's State Tax Service published guidance on exemptions from the advance tax on dividend

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payments (18 percent), including:

- dividends paid to shareholders of a parent company within the limit of the amount of dividend income received by the parent company from other sources, with any excess subject to advance tax;
- dividends paid out of exempt income, up to the exempt income amount in the period in which the dividends are paid;
- dividends paid by mutual investment institutions; and
- payments that are deemed as dividend payments, including different payments to non-residents in controlled transactions exceeding the arm's length amount, the understated value of sales to non-residents below the arm's length price, and payments to non-resident founders/participants in relation to a reduction in authorized capital leading to a reduction in retained earnings.

Guidance on tax obligations for sale of shares in a Ukraine company between non-residents

The Ukraine State Tax Service issued guidance letter n. 1150/IPK/99-00-21-02-02-06 concerning the tax obligations arising in Ukraine in case of sales of shares in a Ukraine resident company by non-resident entities.

According to the letter, sales are generally subject to 15 percent withholding tax in Ukraine unless an applicable tax treaty provides otherwise. The purchaser of the shares is required to register with the Ukrainian tax authority prior to making a payment for the purchase and when the payment is made. The purchaser is also required to withhold the tax due which must be remitted through a bank account established in Ukraine. If the seller provides the purchaser with documentation proving the capital gain amount on the sale, then the gain is subject to tax. Otherwise, in the absence of the capital gain amount, the entire sale amount is subject to tax.

Local Courts

Denmark

Danish High Court issues rulings on the beneficial ownership cases on dividends payments

On May 3, 2021, the Danish Eastern High Court ruled in two cases on the withholding tax exemption benefit under the Parent-Subsidiary Directive. The cases are Skatteministeriet v. TDC A/S (C-116/16) and Skatteministeriet v. NetApp Denmark ApS (C-117/16 Y Denmark ApS), and concern dividend distributions made by a Danish resident company to an intermediate holding company resident in the EU.

In both cases the Danish company requested an exemption from the Danish withholding tax levied on the payments made to the EU parent based on the Parent-Subsidiary Directive (90/435/EC). The Danish tax authorities denied the exemption, arguing that the company receiving the income was a conduit structure and could not be considered the beneficial owner of the payment. The cases made their way through the Danish courts and were eventually

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referred to the CJEU. The CJEU concluded on February 26, 2019 that it is for the referring courts to assess whether the arrangements under review constitute an abuse under EU law, taking into account in particular the existence of conduit companies – see KPMG's EU Tax Centre ETF 396.

The TDC case refers to a private equity owned structure, where the taxpayer was not able to demonstrate that the Luxembourg parents were the beneficial owners, nor that the real beneficial owners would have been entitled to receive the same dividends free of Danish dividend withholding tax without the interposition of the Luxembourg entities. Consequently, the Danish Eastern High Court ruled in favor of the tax authorities, arguing that the structure represents an abuse of the Parent-Subsidiary Directive, as well as the Denmark-Luxembourg double tax treaty and that the benefits should therefore be denied.

In the NetApp case, a US multinational had interposed a Cyprus company between a Bermudan entity and its Danish subsidiary. In this case, the Danish Eastern High Court found that the taxpayer had demonstrated with respect to one of the dividend payments that the dividends had flown through the Bermudan entity to the US parent, which could have received the dividends free of Danish withholding tax had it held the shares directly. Consequently, for that specific payment, no abuse was found and therefore the Court ruled that neither the benefits of the Parent-Subsidiary Directive, nor the provisions of the Denmark-Cyprus tax treaty should be denied. As a result, the ruling determined additional withholding tax of only EUR 3.5 million (instead of EUR 25.5 million).

KPMG Insights

KPMG's EU Tax perspective webcast - Tuesday 1 June

As governments, businesses and societies start to look towards the 'new reality' of life after COVID-19, the pandemic has undoubtedly changed the business ecosystem. To cushion the economic fall-out from the pandemic, the European Union and individual jurisdictions across Europe are considering introducing additional tax policy measures, alongside increasing regulation, rising tax audit demands and heightened corporate and social responsibility risks.

Against this backdrop, we are delighted to invite you to our "EU Tax perspectives" webcast, during which our panel of KPMG specialists will share their insights on some of the latest developments from across the EU affecting multinational groups operating in Europe. Please access the event page to register.

KPMG in Italy webinar on Italian digital services tax - Tuesday 8 June

Although the first digital services tax payment is due on 16 May 2021, there are several aspects that have still not been clarified by the Italian Tax Authority. The Italian KPMG Tax & Legal Team will hold a client webinar to discuss these aspects and to share practical examples and experiences in the field. During the webinar, samples of monthly ledgers and an explanatory report will be shown.

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The webinar will be held on Tuesday 8 June at 5:00pm (CET). Please access the event page to 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.

Raluca Enache
Director, KPMG's EU Tax Centre

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Tax Centre.

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