E-News from KPMG's EU Tax Centre

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Issue 138 – August 31, 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

Application to appeal the General Court's judgment in a case regarding support granted to airlines impacted by COVID-19

On July 26, 2021, the application to appeal a February 2021 judgment of the General Court of the European Union (EU) in the case T-259/20 was published in the Official Journal. The case concerned a deferral of tax payments introduced by France to support airlines, which hold a French license, amid the COVID-19 pandemic (COVID-19). The measure under dispute was approved by the European Commission in March 2020 and was subsequently challenged by an airline headquartered in another Member State.

In its judgment, the General Court held in favor of the Commission and found that the State Aid scheme is compatible with EU law. For more information, please refer to E-News Issue 126.

The application (Case C-210/21) details the grounds for the appeal, where the aviation company argues that the General Court infringed EU law in rejecting the appellant's claim that the non-discrimination principle has been unjustifiably violated, and committed error in law when assessing the breach of the free movement of services and when determining the proportionality of the measure.

Infringement Procedures and CJEU Referrals

Request for a preliminary ruling on Belgium's rules on reversal of share write-downs

On July 7, 2021, the Belgian Supreme Court (Hof van Cassatie) requested the Court of Justice of the European Union (CJEU) to rule in a case concerning the reversal of share write-downs following a company transfer to Belgium – case C-414/21. The appellant is a company initially established in Luxembourg, that recorded several write-downs on shares, with the resulting expenses increasing its tax loss. Subsequently, the appellant was converted into a Belgian company (i.e. moved its registered office to Belgium without maintaining a permanent establishment in Luxembourg). The resulting Belgian company, which was not allowed to carry forward its Luxembourg tax loss, reversed some of the share write-downs and treated them as non-taxable revenues.

Under the Belgian law applicable at that time for companies redomiciled to Belgium, gains and losses from assets attached to a foreign establishment or the assets located abroad and held by that company were to be determined on the basis of their book value at the time of the transfer. Unrealized capital gains could be treated as non-taxable revenues provided that they were recorded in a distinct liability account, not available for distribution. On the other hand, in the case of share write-downs performed in Belgium, the subsequent reversal was generally tax exempt (provided the company treated the initial expenses as non-deductible).

The Belgian tax authorities challenged the tax treatment applied by the appellant on the grounds that the company did not record the resulting gains in a separate liability account (as required by the Belgian law). The company initiated proceedings against the tax authority's decision arguing that the tax treatment applied to write-downs recorded prior to transferring to Belgium represents a restriction of the freedom of establishment.

EU Institutions

EUROPEAN COMMISSION

European Commission provides clarifications regarding BEFIT and the implementation of BEPS 2.0's Pillar Two

A member of the European Parliament (MEP) asked about the Commission's plans to tackle potential objections from Member States against the "Business in Europe: Framework for Income Taxation" (BEFIT). The author also pointed out that the proposal for a common consolidated corporate tax base (CCCTB), which will be withdrawn and replaced by BEFIT, has historically encountered objections on the grounds of conflict with the principle of subsidiarity. The MEP also inquired about the Commission's position on the US push for a global minimum tax, as part of the discussions that are taking place at the level of the OECD/G20 Inclusive Framework on BEPS (IF).

The European Commission's response highlighted their view that the lack of a common framework for corporate taxation within the EU impacts the Single Market negatively. According to the Commission, in the context of the recent IF agreement on the two Pillars, a coordinated approach is needed rather than disparate national measures. The BEFIT proposal would build on the recent agreement, and the Commission commits to carrying out consultations with Member States when drafting it. With respect to the US re-engagement in the IF discussions, the Commission welcomed their involvement and the recent IF agreement. The response also reiterated that once the outstanding policy and technical details are agreed at international level, the Commission will propose a directive to implement Pillar Two – for more details see ETF 453 and the Commissions' FAQ webpage.

European Commission confirms that the EU digital levy is on hold

The European Commission was asked to provide additional details on the status of the IF negotiations on taxing the digitalized economy, as well as to confirm if the proposal for an EU digital levy is still expected by summer 2021.

In their response, the Commission welcomed the global agreement achieved at IF level on the two Pillars of BEPS 2.0. As the work is still ongoing and technical details are still being discussed, the Commission confirmed the need to focus their efforts on the global project. As a result, the work on an EU digital levy has been put on hold until the final details are completed and agreed.

Fight against aggressive tax planning

The European Commission was requested by a member of the European Parliament to provide additional clarifications on their activity in terms of fighting aggressive tax planning. In particular, the MEP mentioned a 2017 decision where the Commission found that a Luxembourg tax ruling issued for an US based multinational represented illegal State Aid – see ETF 339.

The Commission noted the significance the fight against tax avoidance has, as well as the progress made by the EU in terms of legislative measures aimed at tackling aggressive tax planning. The Commission is of the view that, whilst profit shifting practices are still employed by some multinationals, upcoming initiatives such as legislation against the use of shell companies and on public disclosure of taxes paid by corporations would further tackle these practices. Moreover, once the ongoing IF work on Pillar Two is completed, the Commission will focus on implementing the agreement in the EU.

With respect to enforcing State Aid rules in tax planning cases, the Commission noted that they are generally assisting Member States and constantly monitor the effective recovery of State Aid deemed to be unlawful. In the particular case mentioned by the MEP, it was mentioned that the taxpayer has already repaid the unlawful aid and related interest. It was also noted that the General Court has annulled the Commission's decision – see E-News Issue 132 on cases T-816/17 and T-318/18 A.

Clarifications on State Aid enforcement and loss of revenues due to aggressive tax planning

In the context of the recent General Court decision on a Luxembourg tax ruling related to 'arm's length' royalties – cases T-816/17 and T-318/18 A – an MEP asked if the EU Commission plans to change its State Aid enforcement practices. The MEP also enquired about the estimated loss of tax revenues across the EU due to aggressive tax planning and how the Commission plans to tackle it.

The Commission confirmed their decision to appeal the General Court's judgment to the CJEU, as the ruling raises issues relevant in the application of State Aid to tax planning cases. In their view, the General Court made a number of errors of law in its judgment.

In relation to the amount of tax revenues lost across the EU as a result of aggressive tax planning, the Commission noted a 2015 study of the European Parliamentary Research Service. The study estimated an EUR 50 to 70 billion loss per year due to corporate tax avoidance. The Commission also expressed its commitment to continue to use State Aid enforcement as a tool to fight harmful tax practices.

OECD and other International Institutions

OECD

OECD releases the third edition of their Corporate Tax Statistics report

On July 29, 2021, the Organisation for Economic Co-operation and Development (OECD) released the third edition of their annual Corporate Tax Statistics publication, as well as updated supporting data. The data provides internationally comparable statistics and analysis from approximately 100 countries on corporate tax revenues, corporate income tax rates, corporate effective tax rates, and tax incentives related to innovation.

Based on the findings of the report, corporate income tax remains an important source of revenue for governments. Corporate income tax accounts for a higher share of total taxes in Africa (19.2 percent) and in Latin America and the Caribbean (15.6 percent) than in OECD countries (10 percent).

The data also shows that statutory corporate income tax rates have been decreasing in most countries over the last two decades. The average statutory corporate income tax rate for all covered jurisdictions declined from 20.2 percent in 2020 to 20.0 percent in 2021, compared to 28.3 percent in 2000. In the OECD's view, the decline in the tax rates highlights the importance of Pillar Two, which would limit corporate tax competition.

For more details please refer to OECD's dedicated webpage.

Taxation working paper on corporate effective tax rates for R&D

On July 29, 2021, the OECD published a taxation working paper focused on how research and development (R&D) tax incentives influence effective corporate income tax rates. The paper acknowledges that expenditure-based R&D tax incentives are the most common tax policy instrument employed by OECD countries to encourage innovation, and aims to develop a methodology to analyze their impact on companies' effective tax rates.

For more information, please refer to OECD's paper.

BEPS Action 14 peer review reports released

On July 26, 2021, the OECD released stage two BEPS Action 14 (minimum standard on tax-treaty related dispute resolution) peer review monitoring reports for Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania, and South Africa. The reports evaluate the progress made by these jurisdictions in implementing any recommendations resulting from their Stage 1 peer review. Highlights include:

- the Multilateral Instrument was signed by all eight jurisdictions. Five of them (Chile, Croatia, India, Latvia, and Lithuania) have already ratified it;
- Colombia, Croatia, India, Lithuania, and South Africa have issued or updated their Mutual Agreement Procedure (MAP) guidance;
- Colombia, Croatia, India and Lithuania have increased the number of personnel or made organizational changes, with the aim to improve the efficiency and timeliness of MAP cases;
- Argentina, Chile, Latvia and Lithuania complied with the average time of closing MAP cases of 24 months, whilst India and Croatia recorded reductions in the time needed to close MAP cases;
- legislative changes were made by Colombia to ensure that MAP agreements can be implemented notwithstanding domestic time limits.

The OECD is expected to release a new batch of Stage 2 reports in a few months.

For more details please refer to OECD's press release.

OECD publishes updated transfer pricing country profiles

On August 5, 2021, the OECD released updated transfer pricing country profiles for 20 jurisdictions. The OECD has been publishing the transfer pricing profiles since 2009, highlighting key information on the country's transfer pricing legislation and practices, including the application of the arm's length principle.

The 2021 update includes new information on the transfer pricing treatment of financial transactions and the attribution of profits to permanent establishments. Additionally, three new countries are covered (Angola, Romania and Tunisia), bringing the total number of profiles to 60. Further updates are expected in 2021 and in the first half of 2022.

For more information, please refer to the country profiles database.

Conclusions on 25 regimes reviewed as part of BEPS Action 5

On August 5, 2021, the OECD published new conclusions reached by the Forum on Harmful Tax Practices, as part of their on-going review of potentially harmful tax practices. The update covers 25 regimes, as follows:

- the Australian offshore banking regime has now been repealed. Taxpayers already applying the regime can benefit from grandfathering, within certain timelines (read more);
- the Philippines committed to repeal its regional operating headquarters regime as of January 1, 2022 (no grandfathering would apply). The regime is currently considered as "potentially harmful but not actually harmful";
- The United States confirmed its intention to repeal the foreign-derived intangible income (FDII) regime;
- The Dominican Republic, Gabon, Saint Maarten, and Jordan made commitments to amend or repeal six regimes;
- Trinidad and Tobago was not able to fulfil its commitment to repeal its special economic zone regime. As a result, the regime is currently considered "harmful";
- two newly introduced regimes (Hong Kong (SAR), China, and Georgia) were concluded as being "not harmful";
- 12 regimes (in Armenia, Eswatini, Honduras, Lithuania, and Pakistan) are under review for the first time.

As at August 2021, the Forum on Harmful Tax Practices has reviewed 309 regimes. For more details, please refer to OECD's press release.

Mutual Administrative Assistance in Tax Matters developments

On August 11, 2021, the Maldives, Papua New Guinea and Rwanda signed the Convention on Mutual Administrative Assistance in Tax Matters (Convention), as amended by the 2010 protocol. On a related note, on the same day, Jordan deposited its instrument of ratification, and the Convention will enter into force in respect to this jurisdiction on December 1, 2021.

See the full list of participants in the Convention provided by the OECD, as of August 11.

Barbados joins agreement to address the tax challenges arising from the digitalization of the economy

On August 12, 2021, Barbados joined the OECD/G20 IF agreement on the two Pillars solution to reform the international tax rules. Therefore, the global agreement has now been approved by 133 jurisdictions out of the 139 countries that are members of the IF.

Local Law and Regulations

Cyprus

New XML schema for DAC6 filing

On July 29, 2021, the Cypriot tax authorities released a new XML schema for filing reports related to the EU Directive on Mandatory Disclosure Rules (MDR-DAC6). The new XML schema applies starting August 5, 2021.

Czech Republic

Czech tax authorities continue to scrutinize transactions between related parties

The Czech tax administration has published information about tax inspections focusing on transfer pricing issues. During 2020, the tax authorities conducted 249 transfer pricing inspections, and assessed additional corporate income tax of CZK 1.4 billion (approximately EUR 54.8 million). Compared to the additional corporate income tax assessed in 2019, the 2020 amounts represent an almost four times increase.

For more details please refer to a tax alert prepared by KPMG in the Czech Republic.

Gibraltar

Clarifications regarding the corporate income tax rate increase

The Gibraltar Society of Accountants clarified with the Commissioner of Income Tax that the increase in the corporate income tax rate to 12.5 percent is effective as from August 1, 2021. As a result, for accounting periods straddling the date, the new corporate income tax applies for the period beginning August 1 to the end of the accounting period.

For more details please refer to a KPMG TaxNewsFlash.

India

Repeal of retrospective taxation of capital gains on transfers of shares of foreign companies

A legislative provision enacted in 2012 clarified that capital gains arising from the transfer or sales of assets located in India realized through the transfer of shares of a foreign company are taxable in India if the shares, directly or indirectly, derive value substantially from assets located in India. The provisions were enacted with a retrospective effect.

On August 13, 2021, India published legislation which repealed the retroactive taxation of indirect transfers made before May 28, 2012.

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

Italy

Public consultation on CFC regulations

On July 29, 2021, the Italian Revenue Agency launched a consultation on a draft circular providing clarifications regarding the regulations for controlled foreign companies (CFC). The circular includes detailed guidance on the scope of the CFC rules, the control and level of taxation requirements, as well as on determining and taxing the CFC income.

Interested stakeholders were invited to provide comments and feedback by August 6.

Guidance on tax credit incentive for investment in new assets

On July 23, 2021, the Italian Revenue Agency issued guidance on the tax credit incentive for investments in new business assets. The incentive applies for new business assets related to production facilities located in Italy, acquired before December 31, 2022 (an extension to June 30, 2023 is provided, under certain conditions). The tax credit ranges from 6 percent to 50 percent of eligible costs, depending on the type of assets acquired, amount invested and the purchase date.

Kenya

Kenya joins the Multilateral Agreement on Automatic Exchange of Financial Account Information

On July 6, 2021, Kenya joined the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (MCAA). The MCAA provides for the exchange of information under the OECD Common Reporting Standard (CRS). Kenya is expected to exchange information under CRS from September 2022.

A full list of MCAA signatories can be found on OECD’s website.

Luxembourg

Updated guidance on the application of the interest deduction limitation rules (ATAD 1)

On July 28, 2021, the Luxembourg tax authorities issued updated guidance on the application of the interest deduction limitation rules, implemented in line with the EU Anti-Tax Avoidance Directive (ATAD). The new guidance provides additional clarifications in respect of the application of the equity escape clause for members of a consolidated group.

Mauritius

Finance bill update

On August 5, 2021, the Finance (Miscellaneous Provisions) Bill 2021 was passed by the Parliament and received presidential assent. Key amendments include, *inter alia*:

- removal of a proposed requirement that companies engaged in export of goods would need to hold an export development certificate to benefit from the concessionary tax rate of 3 percent;
- the effective date of an extension of the partial exemption regime to investment dealers was amended to be July 1, 2021 (from July 1, 2022).

For more details please refer to a KPMG TaxNewsFlash.

Poland

"Polish Deal" – proposed corporate income tax, individual income tax changes

On 26 July 2021, Poland released for consultation draft amendments to the corporate income tax and individual income tax laws, as part of the changes announced under the so-called "Polish Deal"– see E-News 136. Proposed key changes include, *inter alia*:

- relaxing the conditions for establishing and operating tax capital groups;
- introducing a new holding company regime;
- a suite of innovation-targeted tax reliefs, including incentives for hiring innovative employees, prototype relief covering test production, incentives for making initial public offerings (IPO) or investing in IPOs, robotization relief, as well as enhanced R&D incentives.

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

Spain

Amendments to Spanish CFC and exit tax rules and updated list of non-cooperative jurisdictions

On July 9, 2021, legislation aimed to prevent and fight tax fraud was published in the Spanish official gazette. The law includes measures to amend Spain's CFC and exit tax rules, to comply with ATAD 1.

In short, the CFC rules were extended to cover foreign permanent establishments ("PE"), and changes were brought to the safe harbor provisions and to the definition of passive income. The exit tax rules were extended to cover cases where non-residents transfer PEs from Spain to another country. The indefinite deferral of exit tax until assets are transferred to a third party (for transfers from Spain to an EU/EEA Member State) was removed and replaced with the introduction of the option to pay exit tax in instalments over five years. Additionally, a new rule for the valuation of assets/activities transferred to Spain was introduced. The updated CFC and exit tax rules apply retrospectively from January 1, 2021.

The law also amended the tax haven concept and replaced it with the concept of "non-cooperative jurisdictions", which are determined based on criteria similar to the ones applied for the purposes of the EU list of non-cooperative jurisdictions for tax purposes.

United Arab Emirates

Statement on the OECD Inclusive Framework Agreement

On July 26, 2021, the UAE Ministry of Finance issued a statement welcoming the IF agreement on the two Pillar solution to reform the international tax rules. The statement also confirms the UAE's commitment to working collaboratively with the OECD and IF members to "further advance the technical discussions to ensure a fair and sustainable outcome can be achieved".

The UAE is one of the 133 IF members which approved the IF's global agreement on BEPS 2.0.

United Kingdom

UK publishes draft legislation for Finance Bill 2022

On July 20, 2021, the UK government published draft legislation for Finance Bill 2021-2022 (Finance Bill 2022), together with explanatory notes and responses to several consultations. Most measures had been previously announced, including the proposed new notification of uncertain tax treatments for large businesses and a new regime for the taxation of asset holding companies.

Notably, there was no update on the consultation launched in the spring on the future of R&D tax incentives and no new consultation on draft regulations to implement the OECD's Mandatory Disclosure Rules (MDR), which the UK government said it would consult on later in the year at Budget 2021.

Other key measures include:

- proposed changes to the hybrid mismatch rules, with retrospective effect from January 1, 2017. If enacted, payments made to "relevant transparent entities" would qualify for an existing exclusion from Chapter 7 of the hybrid mismatch rules, which currently only applies to payments to "partnerships";
- draft legislation on measures to tackle promoters of tax avoidance, giving the HMRC new powers to present winding-up petitions for companies operating against the public interest and charge additional penalties on UK entities facilitating the promotion of tax

avoidance by offshore promoters.

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

KPMG Insights

Regional perspectives on Pillar 1 and Pillar 2 developments webcast – Tuesday, September 14

As the Organisation for Economic Co-operation and Development's Inclusive Framework continues to gain traction around the world in terms of Pillar 1 and 2 implementation, there is much for multinational tax and other business leaders to unpack in terms of the implications for their organizations.

During this webcast, you will hear regional views from the Americas, EU, Asia Pacific, Africa and Latin America regions as to the latest developments around Pillar 1 and 2, how they are playing out in these jurisdictions and what multinational tax leaders need to consider now.

Please access the event page to register.

Navigating tax transparency – KPMG Tax Impact Reporting

With environmental, social and governance (ESG) rising on leadership agendas globally, tax practices and governance are becoming critical ESG measures, with tax transparency often being used as a key metric for demonstrating a responsible attitude towards tax.

KPMG Tax Impact Reporting can assist in understanding and progressing tax transparency within your business, helping to inspire both confidence and support from investors, customers and regulators. Through this service offering, KPMG professionals from around the world can help your tax department inform stakeholders of your business's approach to tax, use data-driven methodologies to help accurately compile information on your tax footprint, provide guidance for compliance with tax transparency standards and changes, and use leading technology solutions to support your business on its journey.

For further details please refer to the dedicated KPMG page and the related brochure.

Defensive measures in the EU against non-cooperative jurisdictions for tax purposes

Following the publication in November 2019 by the EU Code of Conduct Group (CoCG) of guidance on defensive measures against jurisdictions deemed un-cooperative (in the tax area) by the EU, Member States committed to implementing and applying from January 1, 2021, at least one from a suite of legislative defensive measures suggested by the CoCG.

The "*Summary of defensive measures against non-cooperative jurisdictions for tax purposes report*" provides a high level overview of defensive tax and administrative measures adopted by a selection of EU/EEA jurisdictions, plus the UK, against countries included on the EU list of non-cooperative jurisdictions for tax purposes as well as on equivalent national lists.

For further details please refer to the dedicated KPMG page and the related slip sheet.

European Commission agenda for business taxation in the EU – BEPS 2.0 and beyond

KPMG's EU Tax Centre prepared an overview of the European Commissions' Communication on "Business Taxation for the 21st Century" (the Communication). The document summarizes the Commission's views on the EU's tax policy agenda and their plans for the implementation of the rules to be agreed upon at international level under the OECD's BEPS 2.0 project.

For further details please refer to the related slip sheet.

Country-by-country reporting

Tax transparency is here to stay. A combination of public pressure and political willpower at both the G20/OECD and European Union (EU) levels has resulted in a paradigm shift in the global tax landscape.

Non-public country-by-country reporting is certainly helping tax authorities gain a better understanding of the overall tax picture of an MNE business and structure, and help ensure better coordination between authorities to prevent double non-taxation. Further on public country-by-country reporting brings additional considerations and concerns to be weighed against the perceived benefits.

For the latest information on the EU's initiatives on public and non-public country-by-country reporting please refer to the dedicated KPMG page.

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 professionals can assist you in meeting the demands of the EU MDR regime, please refer to the dedicated KPMG page.

Tax measures in EU Green Deal – Carbon Border Adjustment Mechanism (CBAM)

According to the UN, as of June 2021 there are 195 signatories to the Paris Agreement to limit their CO_2 emissions. However, the Paris Agreement permits countries to set their own ambitions within certain parameters. The EU has stated its ambition to cut emissions by 2030 by 55 percent in comparison with 1990 levels. This commitment was made as part of the EU Green Deal, which is a comprehensive package of tax and non-tax measures, which includes, among others the CBAM.

For on overview of the features of the EU CBAM and what it means for businesses please refer to the dedicated KPMG page.

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Key links

- Visit our website for earlier editions

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