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## E-News from the EU Tax Centre


## Issue 140 – October 11, 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 Spanish financial goodwill cases

On October 6, 2021 the Court of Justice of the European Union ("CJEU" or Court") gave its decision in a series of cases (C-50/19 P to C-55/19 P, C-64/19 P and C-65/19P) concerning the compatibility of the Spanish rules on financial goodwill amortization with EU State aid rules. The measure at issue allows companies taxable in Spain to amortize for tax purposes the financial goodwill resulting from the acquisition of a shareholding in a "foreign company", under certain conditions, whilst acquisitions of Spanish companies do not benefit from the same beneficial tax


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treatment of goodwill.

In 2009 and 2011, the European Commission issued two negative decisions (2011/5/EC and 2011/282/EU) in which it concluded that this difference in treatment constitutes illegal State aid and ordered its recovery. Several actions for annulment were brought by impacted taxpayers (T-219/10 and T-399/11), and on November 7, 2014, the General Court annulled the Commission's decisions. Following appeals brought by the European Commission (joined cases C-20/15 P C-21/15), the CJEU found on December 21, 2016, that the General Court erred when analyzing the selectivity criterion and decided to set aside the previous judgments and refer the cases back to the General Court. Adjudicating on the referral back, the General Court confirmed on November 15, 2018, that the tax measure at issue was selective and upheld the decisions of the European Commission. In January 2019, several appeals were filed before the CJEU against the General Court' judgement, both from previous appellant taxpayers and Spain.

In its October 6, 2021 decision, the CJEU clarified its case-law on the selectivity of tax measures and noted that the mere fact that a measure is of a general nature, and could apply in theory to all corporate taxpayers if they were to undertake certain transactions, does not entail that the measure is not selective. The Court also recalled that, in order to classify a tax measure as selective, the Commission has to follow a three stage process, as follows:

- identify the common or normal tax system applicable in the Member State;
- demonstrate that the tax measure at issue is a derogation from that reference system, differentiating between companies in a comparable situation;
- ascertain whether the difference in treatment is justified.

For the issue at hand, the Court confirmed the results of the selectivity analysis performed by the General Court and upheld its classification of the Spanish financial goodwill rules as State aid incompatible with the internal market. Consequently, the CJEU dismissed the appeals brought against the General Court's judgments.

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

### CJEU clarifies its case-law on the duty of national courts of last instance to request a preliminary ruling

On October 26, 2021, the CJEU issued its decision in the case Consorzio Italian Management e Catania Multiservizi (C-561/19) on a request for a preliminary ruling from the Italian Council of State. The case concerns, inter alia, the interpretation of the third paragraph of Article 267 of the Treaty on Functioning of the European Union (TFEU), which sets the duty, for national courts of last instance, to refer a case to the CJEU for a preliminary ruling.

The Court reasserted the criteria previously set out in the CILFIT case (C-283/81), based on which courts of last instance, as an exception, can decide not to refer a case to the CJEU:

- the question asked is not relevant, i.e. the answer to that question cannot affect the outcome of the case; or
- a precedent has already been established by the Court (also referred to as "acte éclairé"); or

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- the relevant provision of EU law is so clear that there is no reasonable doubt as to the manner in which the question raised is to be resolved (also referred to as “acte clair”).

The Court did not fully address Advocate General (AG) Bobek’s opinion – see E-news 131 – that the CILFIT criteria should be reassessed, and focused on brining additional clarifications to its settled case-law. In respect to the third exception, the Court clarified the concept of “no reasonable doubt”, which should be assessed in light of the particularities of EU law. Thus, the national court must be “convinced that the matter would be equally obvious” to other courts of last instance. The mere fact that divergent interpretations or case-law exist regarding the EU law provision relevant for the proceedings is not sufficient to determine if there is reasonable doubt regarding the correct interpretation. Nevertheless, in these cases, the national courts are required to be more vigilant when assessing if this criterion is met. The CJEU noted that if a court of last instance decides not to refer a case for a preliminary ruling, the court has to explain in their statement of reasons for its decision the CILFIT exception applicable in their specific case.

The CJEU also concluded that a court of last instance is not relieved by its duty to make a reference for a preliminary ruling by the mere fact that it has already made a reference in the same national proceedings.

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

### Advocate General's Opinion on Finish tax exemption for open-end funds

On October 7, 2021, Advocate General (AG) Henrik Saugmandsgaard Øe of the CJEU published his Opinion in the case C-342/20, concerning income derived by a French open-end investment fund from real estate property located in Finland.

The applicant, ‘A’ SCPI, is an investment fund constituted under French law in the form of a société civile de placement immobilier à capital variable – SCPI (open-ended real estate investment fund), treated as tax transparent in France, that intends to perform several real estate investments in Finland. Based on the Finnish domestic law and the double tax treaty concluded between France and Finland, non-residents deriving rental income (directly or indirectly) from Finland are liable to tax in that jurisdiction. Specific exemptions apply for Finnish investment funds or for equivalent EU investment funds. However, starting from 2020, a legislative amendment limits the applicability of the tax exemption to foreign open-ended investment funds constituted by contract, meaning that investments funds set up as companies are no longer eligible to benefit from the exemption.

In his opinion, the AG first analyzed which fundamental freedom could be restricted by the Finnish legislation at issue. In his view, the analysis should be performed from the perspective of the free movement of capital, since the disputed tax previsions may apply to income from any holding in a Finnish company, irrespective of the size of that holding. The AG further notes that the disputed difference in treatment derives from the fact that Finland chose to implement in its corporate income tax law a tax transparency mechanism applicable if certain criteria are met. In the AG’s view, including a criteria such as the one requiring investments funds to be set up in a contractual form, which a French SCPI would not be able to meet, represents a restriction of the

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free movement of capital.

The AG continues by performing a comparability analysis between Finnish investments funds (set up based on a contract) and French open-end investments funds set-up as companies. The AG notes that the purpose of a tax transparency mechanism is to align the tax treatment of the entities concerned with their legal form, i.e. to treat entities that are transparent from a legal point of view as transparent for tax purposes. As such, the objective of the Finnish tax transparency mechanism is to exempt from corporate income tax entities that do not make a distinction between the economic activity of the entity and those of the investors. . The AG concludes that French open-end investment funds have the same characteristics as contractual-based funds and are therefore in a comparable situation with Finnish investment funds. In the AG's view, linking the corporate income tax exemption to a distinction as to the legal form of the investment fund is an arbitrary difference in the treatment of comparable entities.

The AG rejected Finland's argument that the difference in treatment is required to ensure a predictable tax regime and preserve the principle of legal certainty. The AG noted that existing case-law does not imply that the objective of legal certainty could justify a restriction on the freedom of movement. Consequently, the AG concluded that the requirement that a fund is set-up based on a contract in order to benefit from the Finish corporate income tax exemption represents a breach of the free movement of capital.

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

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## Infringement Procedures and CJEU Referrals

### Infringement procedures

#### Letter of formal notice to Cyprus on the implementation of the interest limitation rule under ATAD 1

On September 23, 2021, the European Commission announced its decision to send a letter of formal notice to Cyprus on the implementation of the interest limitation rule pursuant to the EU Anti-Tax Avoidance Directive 2016/1164 (ATAD 1).

According to the Commission, Cyprus opted to exempt financial undertakings from the interest limitation rules in the ATAD 1, and extended the exemption to securitization vehicles. The Commission noted that the definition of financial undertakings under ATAD 1 does not include securitization vehicles and concluded that the domestic implementation of the directive represents an infringement of EU law.

Cyprus has two months to reply to the arguments raised by the European Commission, after which the Commission may decide to send a reasoned opinion.

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For more information, please refer to the Commission's September infringements package.

### Letter of formal notice to the Czech Republic on the implementation of ATAD 1

On September 23, 2021, the European Commission announced its decision to send a letter of formal notice to the Czech Republic for failing to communicate all required domestic measures regarding the implementation of the Council Directive (EU) 2017/952 amending Directive 2016/1164 (ATAD 2).

The Czech Republic was due to provide full details on the implementation of ATAD 2 by December 31, 2019, but only complied with this requirement partially. If the Czech Republic does not address the issue by notifying the missing information, the Commission may decide to send a reasoned opinion.

For more information, please refer to the Commission's September infringements package.

## CJEU Referrals

### Commission repeals its decision to refer the United Kingdom to the CJEU for failure to fully recover illegal State aid in Gibraltar

On October 6, 2021, the Commission announced the repeal of its decision to launch a Court action against the UK 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. Gibraltar was required to recover the aid from companies that benefitted from the scheme. On March 19, 2021, the Commission noted that Gibraltar had only completed the recovery of the State aid from two of the four beneficiaries and decided to refer the UK to the CJEU – see E-news 129.

The United Kingdom subsequently confirmed that Gibraltar continued its efforts to recover the outstanding State aid and managed to complete the recovery by July 14, 2021 . Consequently, the Commission decided to repeal it decision to refer to UK to the CJEU.

### Referral regarding the dormant company test applicable in Italy before 2007

On October 6, 2021, the Italian Supreme Court referred two new direct tax requests for preliminary rulings to the CJEU. The cases (C-433/21 and C-434/21) concern the compatibility of the Italian dormant company regime applicable until 2006 with the principle of non-discrimination and the EU freedom of establishment. The domestic dormant company regime excluded from the dormant company test companies whose shares (or the shares of the direct or indirect owner) were negotiated on regulated Italian stock markets, but it did not exclude companies whose shares were negotiated on foreign (including other EU) regulated stock markets. Following a 2007 amendment, the dormant company test no longer applies to Italian companies directly or indirectly owned by a company whose shares are negotiated on an Italian

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or foreign regulated stock market.

### Referral regarding German sanctions for failure to comply with transfer pricing documentation rules

On October 4, 2021, the Finanzgericht Bremen (Germany) made a request for a preliminary ruling referred to as case X GmbH & Co KG (C-431/21) concerning sanctions for incompliance with transfer pricing documentation requirements.

The referring court notes that under the transfer pricing rules in Germany there is a rebuttable presumption that, if a taxpayer fails to submit the relevant documentation, its German taxable income is higher than the one declared. In these cases, the tax authorities are required to estimate the additional income based on certain price bands and could chose to select the upper value of the range and impose additional penalties computed as a percentage of the additional income estimated, plus late payment penalties (if the case). The CJEU is asked to decide whether if these rules are compliant with the freedom of establishment and the freedom to provide services established by the TFEU.

## State aid

### Appeal brought against the General Court's judgment in two cases regarding Luxembourg tax rulings related to intra-group financing structures (Case C-454/21 P)

On July 22, 2021, an application to appeal the May 2021 judgment of the General Court of the European Union in the cases T-516/18 and T-525/18 was submitted. The cases concerned 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 the disputed judgment, the General Court had upheld the European Commission's decision that Luxembourg had granted illegal State aid. For more information, please refer to E-news 125.

The appellants argue that the General Court misinterpreted the facts and committed an error of law when defining the reference framework used for determining the selectivity of the State aid measure. In the second ground of appeal, the appellants claim that the General Court committed errors of law by determining the existence of a selective tax advantage in the light of the Luxembourg national measures relating to abuse of law. The third ground of appeal claims that the General Court erred in law by rejecting the appellants' arguments regarding an alleged misuse of powers by the Commission.

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## EU Institutions

### EUROPEAN COMMISSION

#### DG TAXUD informal update on the EU tax agenda

On September 22, 2021, as part of the annual tax conference hosted by the Finish Chambre of Commerce, Mr. Gerassimos Thomas (Director General Taxation and Customs Union at the European Commission) provided an overview of the EU tax agenda for the upcoming years.

In his speech, Mr. Thomas reiterated the Commission's targeted efforts to ensure that all EU Member States endorse, in the course of autumn 2021, the OECD/G20 Inclusive Framework (IF) agreement on the two-Pillar solution to reform the international tax rules. At the time of the conference, Estonia, Hungary and Ireland had not yet signed the IF statement, while Cyprus was not part of the IF discussions and had not expressed an official position.

Mr. Thomas confirmed that a draft directive to implement Pillar Two in the EU would be published by the Commission "immediately" after the final technical details are agreed upon at global level, and explained why the transposition of the new rules requires the use of a directive. In short, key Pillar Two aspects are designed in a similar way to controlled foreign company (CFC) rules previously found by the CJEU as restricting EU fundamental freedoms, if enacted unilaterally (see the CJEU's decision in C-196/04, Cadbury Schweppes). Consequently, if a Member State transposed the Pillar Two rules via unilateral measures, applicable only to cross-border situations, the implementing provisions could be challenged on the grounds of incompatibility with EU law.

On the same issue, a report commissioned by a Member of the European Parliament analyzes in detail the interaction between Pillar Two and the EU fundamental freedoms. The study similarly notes that unilateral implementation by a Member State of the Income Inclusion Rule (IIR) and the Undertaxed Payments Rule (UTPR) would infringe the EU freedom of establishment. In order to mitigate this issue, the author suggest that Member States, if acting unilaterally, could extend the application of the IIR and the UTPR to under-taxed profits of domestic group entities – for more details please refer to the study.

The speech also provided insights on other initiatives announced in the Commissions' Communication on Business Taxation for the 21st Century – see ETF 448, and confirmed that the upcoming revision of the Directive on Administrative Cooperation - DAC8 would also include provisions to make the existing exchange of information more effective (in addition to extending its scope to cover crypto-assets and e-money).

For more details please refer to the transcript of Mr. Thomas' speech.

#### Consultation on the EU-wide system for relief from withholding tax on dividend and interest payments

On September 28, 2021 the European Commission published the Inception Impact Assessment for an initiative for an EU-wide system for relief from withholding tax on dividend and interest

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payments. The objectives of the initiative are to streamline the withholding tax relief procedures for non-resident investors, enhance the capabilities of tax administrations, as well as to identify and target the abuse of double tax treaties. According to the document, several tax policy options (or a mix) would be analyzed for the purpose of designing the legislative proposal:

- make withholding tax refund procedures more efficient. This option could include the digitalization of the withholding tax relief process, as well as common standardized forms and procedures for refund claims;
- the establishment of a fully-fledged common EU relief at source system. A standardized EU system would be set up, based on which the reduced withholding tax rate provided by the relevant double tax treaty would be applied at the time when the dividend / interest is paid;
- enhancing the existing administrative cooperation framework, to support verifying if the recipients are entitled to double tax treaty relief.

Interested parties are asked to provide feedback and comments by October 26, 2021. The input received will be published on the Commissions' website and will be taken into account in fine tuning the initiative. In terms of next steps, a more targeted public consultation (based on a questionnaire) is expected before the end of the year. The planned adoption by the Commission of a legislative proposal is expected for the fourth quarter of 2022.

For more details please refer to the Commission's dedicated webpage.

## COUNCIL OF THE EU

### Council of the EU approves compromise text on public country-by-country reporting

On September 28, 2021, the Competitiveness configuration (COMPET) of the Council of the EU adopted the Council's position at first reading on the EU public Country-by-Country Reporting directive. Adoption by the European Parliament – the next step in the legislative process, is expected in November 2021. The Directive will enter into force 20 days after its publication in the EU Official Journal.

For more details please refer to ETF 456.

### Updates to the EU list of non-cooperative jurisdictions

On October 5, 2021, the Council adopted conclusions on a revised EU list of non-cooperative jurisdictions for tax purposes. The Council agreed to move Anguilla, Dominica and Seychelles to Annex II of the list (the so-called "grey list").

Costa Rica, Hong Kong (SAR), China (hereinafter, Hong Kong (SAR)), Malaysia, North Macedonia, Qatar and Uruguay were added to the grey list following a review of their foreign source income exemption (FSIE) regimes or other regimes deemed harmful and in light of commitments made to repeal or amend those regimes.

Australia, Eswatini and Maldives were removed from the document, having fulfilled all their

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commitments. No jurisdictions were added to Annex I (the list of non-cooperative jurisdictions).

Following this latest revision, the EU list of non-cooperative jurisdictions includes the following nine jurisdictions: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands, Vanuatu.

The grey list includes the following fifteen jurisdictions: Anguilla, Barbados, Botswana, Costa Rica, Dominica, Hong Kong (SAR), Jamaica, Jordan, Malaysia, North Macedonia, Qatar, Seychelles, Thailand, Turkey and Uruguay.

For more details please refer to ETF 457.

## EUROPEAN PARLIAMENT

### Reforming the EU policy on harmful tax practices (including the reform of the Code of Conduct Group)

On October 7, 2021, the European Parliament (EP) adopted a resolution asking the Council and the European Commission (EC) to reform the EU policy on harmful tax practices.

The resolution builds on the Parliament's resolution on "Reforming the EU list of tax havens" of January 21, 2021 (see ETF 440), which was followed by an exchange of views with the Chair of the Code of Conduct Group, as well as a public hearing to discuss ways to improve and reform the Code of Conduct as well as ways to tackle harmful tax practices. The insights of these discussions were taken up in the resolution, which was first published by the FISC Subcommittee as a draft own-initiative report on April 27, 2021 and later adopted by the Committee on Economic and Monetary Affairs on July 17, 2021.

The resolution outlines the parliament's priorities for reforming EU policy on harmful tax practices as well as for reforming the criteria, governance and scope of the Code of Conduct on Business Taxation:

*Recommendations for future EU work on Harmful Tax Practices*

In the first part of the resolution the members of the EP address the need for EU policy reforms on harmful tax practices and endorse the EC's "Business taxation for the 21st century" action plan - see ETF 448 for more details.

In addition, the EP proposes various further actions that the European Commission could take to improve future EU work on harmful tax practices, inter alia:

- adopting a definition of "minimum level of economic substance", compatible with the OECD BEPS Action 5, preferably based on a formulaic approach;
- issuing guidelines on how Member States can design fair and transparent tax incentives with fewer risks of distorting the EU Single Market;
- assessing the effectiveness of patent boxes and other intellectual property (IP) regimes under the new nexus approach defined under OECD BEPS Action 5;
- including issues related to aggressive tax planning in the country-specific recommendations issued each year as part of the European Semester.

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*Reform of the Code of Conduct on Business Taxation*

In the second part of the resolution, the EP calls on the Council to review the criteria, the governance and the scope of the Code of Conduct through a binding instrument, including a more transparent and efficient decision-making procedure. In this regard, they demand, *inter alia*:

- that decision-making by the Code of Conduct Group should be publicly available;
- the involvement of an expert group composed of experts from civil society, the EC and the Parliament;
- the adoption of an effective tax rate criterion in line with the internationally agreed minimum effective tax rate under the OECD BEPS Pillar Two as well as clear economic substance requirements to assess whether a tax regime is potentially harmful;
- the development of a “Framework on Aggressive Tax Arrangements and Low Rates” (FATAL) that eventually replaces the current Code of Conduct. The proposed Framework would deal with tax measures that provide for a significantly lower effective level of taxation than those that generally apply in the Member State in question, or below the internationally agreed minimum effective tax rate under the OECD BEPS Pillar Two.
- allowing Member States to implement countermeasures that would reduce tax avoidance incentives where another Member State fails to roll back within two years a regime that has been assessed as harmful, in particular:
    - (a) non-deductibility of costs;
    - (b) withholding tax measures;
    - (c) limitation of participation exemption;
    - (d) special documentation requirements, especially regarding transfer pricing.
- the Chair of the Code of Conduct Group to appear at least once a year before Parliament at a public hearing and the EP to be granted an observer role in the Code of Conduct Group discussions.

## OECD and other International Institutions

### OECD

#### OECD/G20 Inclusive Framework Agreement on BEPS 2.0 – update

On October 8, 2021, 136 member jurisdictions of the OECD/G20 Inclusive Framework (IF) on base erosion and profit shifting (BEPS), representing more than 90 percent of global GDP, approved an eight-page statement finalizing several key aspects of a framework for reforming the international tax system.

The document updates previous statements from July 1 and July 10, 2021 – see ETF 453 – and provides insights into several previously unsettled quantitative parameters of the two-Pillar approach. The implementation plan included in the Annex targets a 2023 effective date for most aspects of both Pillar One and Pillar Two, with detailed rules to be developed over the coming months.

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For more details please refer to ETF 458.

### OECD/G20 Inclusive Framework on BEPS: progress report July 2020-September 2021

On September 30, 2021, the OECD published a report outlining the progress made to deliver on the mandate of the IF. The report covers the period July 2020 to September 2021, but generally takes stock of the progress achieved since BEPS implementation began.

The report acknowledges that the IF's efforts over the reporting period were mainly focused on the BEPS 2.0 two-Pillar solution, but highlights that continued progress was also achieved on the other actions included in the BEPS package.

In respect to the four BEPS minimum standards, the document notes the following:

- Harmful Tax Practices (Action 5): since its inception, the Forum on Harmful Tax Practices (FHTP) has reviewed over 300 preferential regimes to ensure compliance with the standard. As a result, all regimes found to be harmful were either amended or abolished. Additionally, in March 2021, the 12 "no or only tax jurisdictions" began information exchanges under the FHTP standard;
- Tax Treaty Abuse (Action 6): the third peer review report (April 2021) highlighted tangible progress for a majority of IF members in terms of modifying their tax treaty network to comply with the relevant minimum standard;
- Country-by-Country (CbC) reporting (Action 13): as of the date of the report, over 100 jurisdictions had introduced CbC reporting requirements. The next Action 13 peer review report will be released in October 2021;
- Mutual Agreement Procedure (Action 14): as of the date of the report a total of 82 stage 1 peer review reports and 45 stage 1 & stage 2 peer monitoring reports had been finalized. The document notes a significant increase in the number of resolved mutual agreement procedure (MAP) cases in almost all reviewed jurisdictions, as an improvements in terms of allowing access to MAP and overall streamlining the process.

Furthermore, the report provides an update on the work carried out in response to COVID-19, including the OECD's tax policy information and recommendations, and targeted technical assistance for developing countries.

For more details please refer to OECD's report.

### Multilateral Convention developments

On September 30, 2021, Namibia signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), becoming the 96th jurisdiction to join the MLI.

Andorra and Spain deposited their instruments of ratification of the MLI on September 29 and September 28, respectively. For these two jurisdictions, the MLI will enter into force on January 1, 2022. The total number of jurisdictions which have ratified, accepted or approved the MLI now stands at 67.

The Convention became effective on 1 January 2021 for approximately 650 treaties concluded

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among the 67 jurisdictions, with an additional 1200 treaties to become effectively modified once the MLI is signed by all parties. See the full list of the signatories and parties to the MLI provided by the Organisation for Economic Cooperation and Development (OECD), as of September 30, 2021.

## Automatic Exchange of Financial Account Information in Tax Matters – developments

On September 28, 2021, Rwanda committed to implement the international Standard for Automatic Exchange of Financial Account Information in Tax Matters (AEOI) by 2024. Moldova also committed, on September 23, to implement the AEOI, by 2023.

These developments bring the number of jurisdictions committed to start the AEOI by a specific date to 120. See the full list of AEOI commitments provided by the OECD, as of September 27, 2021.

## New version of the Manual on Exchange of Information

On September 16, 2021, the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), the World Bank Group and the African Development Bank published jointly a new version of the Manual on Exchange of Information.

The new manual builds on the 2013 edition and covers a broader scope regarding exchange of information (EOI) tools, including guidance and templates for simultaneous tax examination, and tax examinations abroad (to collect information in a foreign jurisdiction).

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

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## Local Law and Regulations

### Finland

Tax proposals in the 2022 budget

On September 9, 2021, Finland's Ministry of Finance issued a release on the budget proposal for 2022. Potential changes in the area of direct taxation include, *inter alia*:

- the temporary double depreciation rules for machinery and equipment will be extended to fiscal years 2024 and 2025 (it was initially due to expire in 2023);
- an extra deduction of 150 percent would apply for research and development expenditure (R&D) costs incurred as part of cooperation projects between research organizations and companies;
- exit taxation would be implemented starting 2023 for individuals moving abroad;
- gains derived by foreign funds from real estate investments will be taxed in Finland “as broadly as possible” starting 2023;
- the balance sheet exemption for limiting the deductibility of interest expenses would be restricted starting 2022 with the aim of tackling aggressive tax planning through private equity structures;
- a review of specific transfer pricing rules will take place in 2022, to bring them closer to the OECD Transfer Pricing Guidelines.

### Jordan

Transfer pricing guidance published

In September 2021, the Jordan Ministry of Finance published detailed implementation instructions for the transfer pricing regulations issued on June 7, 2021.

The current guidance clarifies that the transfer pricing rules apply to any taxpayer in Jordan with related party transactions exceeding JOD 500,000 (approximately EUR 611) in a 12-month period and detail the documentation requirements applicable to such taxpayers.

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

### Kenya

High Court declares minimum tax as unconstitutional

On September 20, 2021, Kenya's High Court issued a judgment finding that country’s minimum tax unconstitutional. As previously reported, the minimum tax (1 percent of gross turnover) has been effective from January 1, 2021 and is due when the amount of a taxpayer’s corporate income tax instalment  payable is less than the amount of the minimum tax. Kenya’s High Court had issued an order that temporarily prevents the tax authorities from collecting and demanding the minimum tax, as a result of the (then) pending case regarding the constitutionality of the tax – see E-news 131.

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In its September 20 decision, the Court relied on the principle of equitable sharing of the tax burden in finding that imposition of a minimum tax is unconstitutional.

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

## Malta

### Commitments targeting aggressive tax planning practices

Malta's Recovery and Resilience Plan, endorsed by the European Commission on September 16, 2021, includes several commitments aimed at tackling what the Commission refers to as "aggressive tax planning".

In short, Malta is expected to:

- introduce transfer pricing legislation. The country has previously indicated their intention to implement transfer pricing rules – see E-news 131.
- introduce limitations to Malta's participation exemption regime for dividends derived from countries on the EU list of non-cooperative jurisdictions (by September 30, 2022).
- commission an independent study to analyze the state of play and provide recommendations for tackling base erosion and profit shifting through outbound and inbound dividend, interest and royalty payments. The results of the study will feed into a follow-up legislative measure, to be implemented by September 30, 2024.

For more details please refer to the Commissions' Q&A document.

## Netherlands

### Tax measures proposed in the 2022 budget

On September 21, 2021 (Budget Day), the Dutch government submitted to the lower house of Parliament draft tax measures for 2022. Proposed direct taxation changes include, *inter alia*:

- addressing mismatches in non-arm's length transfer pricing;
- expand the scope of hybrid mismatch measures, to apply to mismatches with individuals;
- introduce a taxpayer status measure for reverse hybrid entities;
- setting off foreign taxes in instances of multiple controlled entities;
- crediting of dividend tax and tax on games of chance limited to the amount of corporate income tax payable (in connection with Sofina judgment, (C-575/17);
- as of 2022 also withholding tax on interest and royalties attributable to immovable property located in the Netherlands;
- clarification that no withholding tax is payable by hybrid entities without participant with a qualifying interest.

The bill to address mismatches in the application of the arm's length principle had previously been subject to public consultation, which ended in April 2021 – see E-news 128. The measures, as proposed, would apply for the first time to financial years beginning on or after January 1,

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2022. The bill addresses informal capital arrangements and deemed dividend arrangements. Under the proposed rules, downward adjustments of Dutch profits on the basis of the arm's length principle would, in principle, only be taken into account insofar as the taxpayer can demonstrate that a corresponding upward adjustment is subject to profit tax at level of the other (associated) entity with which the legal relationship was concluded.

For more details please refer to a high level overview or a detailed summary of the proposed tax measures, prepared by KPMG in the Netherlands.

### Poland

#### Updated proposals for changes to withholding tax collection rules

Amendments pursuant to the so-called "Polish Deal" propose changes to the withholding tax collection provisions, including a narrowing of the scope of application for the remittance and refund mechanism regarding passive payments to non-residents.

According to the proposal, expected to be effective January 1, 2022, Polish taxpayers paying dividends, interest or royalties (exceeding PLN 2 million or approximately EUR 440,000 per beneficiary per tax year) would be required to collect withholding tax (at a rate of 20 percent or 19 percent, depending on the type of payment). Non-resident taxpayers could subsequently apply for a refund, if a lower rate is available. Payments related to intangible services would not be included in the scope of the pay and refund mechanism.

The withholding tax provisions were originally scheduled to be effective January 1, 2019 but have been postponed several times – see E-news 124.

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

### Sweden

#### Tax measures proposed in the 2022 budget

On September 20, 2021, the Swedish government submitted the 2022 budget bill to the Swedish Parliament. Proposed direct taxation changes include, *inter alia*:

- a new withholding tax framework for dividends paid to non-residents, (expected to generally apply with regard to dividends paid after December 31, 2023). Currently a 30 percent withholding tax applies for dividends, but several exemptions are available (e.g. if the shares are held for business reasons). No further details have been disclosed, but if the final proposal is in line with previous versions considered by the Swedish government, domestic exemption for business-related shares might be restricted to cover only dividends paid to companies within the European Economic Area (EEA);
- the introduction of a special limitation rule that would limit the ability to use prior years' losses after a change of ownership (which would apply retrospectively for changes in ownership that take place after June 10, 2021).

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For more details please refer to a KPMG TaxNewsFlash.

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## Local Courts

### Germany

Application of EU Parent-Subsidiary Directive when partnership acts as intermediary

Germany's Federal Tax Court (BFH) held that the requirements of the EU Parent-Subsidiary Directive can be met where an interest is held through an asset management partnership. The case concerns a Dutch taxpayer, set-up as a cooperative under Dutch law, which held a 33.6 percent share in a German asset management partnership (GbR, civil law partnership). The GbR, in turn, held a 100 percent shareholding in a German company (AG, public limited company). Dividends were distributed by the German AG in 2014.

Under the law transposing the Parent-Subsidiary Directive in Germany, a dividend withholding tax refund can be claimed by a non-resident shareholder provided it holds a direct 10 percent interest in the German corporation. In dispute was whether the Dutch taxpayer held a direct interest in the German AG, within the meaning of the EU Parent-Subsidiary Directive.

The BFH took the same view as the Cologne Lower Tax Court — that there was a direct holding despite the GbR acting as an intermediary. Even though the asset management partnership was the legal owner of the investment in the German AG under civil law, the requirements of a direct investment within the meaning of the German refund regulation were met from a tax perspective. The Court applied the transparency principle, based on which the partnership's assets are proportionally attributable to the partners. Consequently, the Court applied a "look-through" approach when assessing the required minimum holding of 10 percent.

For more details please refer to KPMG TaxNewsFlash.

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## KPMG Insights

### EU Financial Services Tax perspectives – Wednesday, October 13

The pandemic has fundamentally changed the environment in which financial services operate. With the acceleration of digitalization, coupled with the complexity and dynamic nature of international tax legislation the EU tax agenda remains persistently in the spotlight.

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This webcast will share insights on some of the latest developments impacting asset managers, banks and insurers with a focus on:

- EU communication on Business Taxation for the 21st Century & evolution of the Directive on Administrative Cooperation;
- Recent developments across Europe on beneficial ownership, the MLI and other anti-avoidance rules as they apply to withholding taxes and securities;
- DAC 7 & 8 and beyond.

Please access the event page to register.

### Insights into new rules for Digital Platform Operators webcast – replay now available

The replay from KPMG's "Insights into new rules for Digital Platform Operators" October 6, webcast is now available on KPMG's Future of Tax & Legal webcast series page. In this session, KPMG specialists shared views regarding the new rules under the EU Directive on Administrative Cooperation in the field of taxation ('DAC7'), the OECD Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy, and the potential impact these rules may have on Digital Platform Operators.

### 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.

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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

### KPMG Insights on the EU Green Deal

The KPMG Virtual Center of Excellence (VCOE) for Excise and Environmental Taxes and KPMG member firm professionals developed a set of materials on the EU Green Deal. For further details please refer to the dedicated KPMG umbrella page, or to one of the targeted sub-pages:

- Carbon Border Adjustment Mechanism (CBAM): overview of the July 14 CBAM regulation proposal, one-page summary of the proposal and insights on how the draft regulation fits in the wider WTO and global framework;
- Energy Taxation Directive (ETS): overview of the proposal to revised the ETS;
- EU's plastics tax: dedicated webpage.

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### Key links

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- Visit our website for earlier editions

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