KPMG

E-News from KPMG's EU Tax Centre

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KPMG's EU Tax Centre compiles a regular update of EU and international tax developments that can have both a domestic and a cross-border impact, with the aim of helping you keep track of and understand these developments and how they can impact your business.

Latest CJEU, EFTA and ECHR

Advocate General's Opinion on the application of withholding tax on fictitious interest assessed on an interest-free loan

On September 30, 2021, Advocate General (AG) Athanasios Rantos of the Court of Justice of the European Union (CJEU) published his Opinion in the case C-257/20, concerning national anti-abuse provisions allowing the assessment of withholding tax on fictitious interest related to interest-free loans granted between related parties.

The applicant is a Bulgarian company, which received an interest-free convertible loan from its Luxembourg-based parent company, repayable 60 years after the loan agreement entered into force. Based on national anti-tax evasion and avoidance provisions, the Bulgarian tax authorities computed an arm's length interest rate for the loan and assessed a 10 percent withholding tax on the resulting interest.

In his opinion, the AG reiterated that the EU Interest and Royalties Directive and the Parent-Subsidiary Directive have, inter alia, the common objective of preventing tax evasion and, as such, allow Member States not only to take the measures necessary to prevent tax evasion , but also to refuse to apply the provisions of the directives in the event of fraud or abuse. When the tax administration fixes and taxes fictitious interest relating to an interest-free loan, the lender does not receive any interest and therefore cannot, in the AG's opinion, be considered a "beneficial owner" thereof, and therefore the Interest and Royalties Directive therefore does not apply. The fictitious interest established by the tax authorities in order to subject to tax a transaction considered to be hidden under national law cannot be regarded as a "distribution of profits" within the meaning of the Parent-Subsidiary Directive, in particular in the absence of an actual payment of interest between these two companies of the same group.

The AG continued by analyzing the compatibility of the withholding tax assessed by the tax authorities with the freedom of establishment. The AG noted that EU law does not, in principle, conflict with national legislation which, in application of the "arm's length principle" and with a view to combating tax evasion, subject to withholding tax the fictitious interest that a resident subsidiary would have been required to pay under market conditions. However, in other to comply with EU law, the tax adjustment should be based on an individual examination of the transaction concerned, while also granting the taxpayer the possibility to produce evidence to support the economic substance of the transaction.

AG Opinion on the French "précompte" regime

On October 14, 2021, AG Kokott of the CJEU published her Opinion in the case C-556/20, concerning the compatibility of the French "précompte" advance payment regime with Article 4 and Article 5 of the Parent-Subsidiary Directive. The case follows two previous decisions of the CJEU (in cases C-310/09 and C-416/17) about the régime (repealed since 2005), which provided for an advance tax payment on redistributions made by French parent companies from profits received from subsidiaries established in another EU Member State.

In her opinion, the AG reiterated settled case-law based on which granting a French company a tax credit for advance tax payments due on French-sourced dividends redistributed to its shareholders, while no equivalent tax credit was available in respect of dividends received from subsidiaries located in other Member States, is contrary to the freedom of establishment and the free movement of capital. The AG further noted that the disputed advance tax was paid by the distributing company – and not by the shareholders, and therefore does not represent a withholding tax precluded by the Parent-Subsidiary Directive. Furthermore, from a substantive perspective, due to the fact that the advance payment was offset by a tax credit received by the recipient of the distribution, no additional taxation occurred. Therefore, in the AG's view, the "précompte" advance payment regime was not contrary to Article 5 or Article 4 of the Parent-Subsidiary Directive.

Based on the reasoning above, the AG concluded that the Parent – Subsidiary Directive does not preclude a levy such as the advance payment on redistributions imposed by France, as long as a corresponding tax credit which neutralizes the levy is equally granted in both domestic and cross-border scenarios.

EU Institutions

EUROPEAN COMMISSION

European Commission work program for 2022

On October 19, 2021, the European Commission (EC or Commission) unveiled its work program for 2022. In the field of direction taxation, the document notes that the Commission is planning to issue an EU Directive to implement Pillar 1 of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (IF) agreement on BEPS 2.0. Nevertheless, in an earlier statement, the European Commissioner for Economy, Paolo Gentiloni, stated that the EC "will carefully examine whether a directive is needed to ensure its consistent and effective implementation at EU level". Therefore, it remains to be decided whether an EU initiative to implement Pillar 1 would be indeed issued. The work program does not refer to a Pillar 2 directive, which, according to recent statements by EC officials, is expected before the end of 2021, once the OECD Inclusive Framework (IF) have published the draft Model Rules.

The document is silent on the expected proposal for an EU digital levy, which was due to be published in autumn 2021, following a delay of the original timeline. In its May 18 Communication – see ETF 448 , the Commission confirmed that the digital levy would co-exist with the Pillar 1 agreement.

Italian state aid scheme approved by the European Commission

On October 15, 2021, the Commission approved an Italian state aid scheme under which companies impacted by COVID-19 could benefit from tax breaks.

In short, the aid scheme includes tax exemptions, tax credits and tax reductions, as well as direct grants and a support scheme for fixed costs incurred between March 2020 and December 2021.

The European Commission confirmed that the scheme complies with the criteria set under the temporary framework for state aid because, since it the support would not exceed the thresholds provided by the framework and it would not be granted after December 31.

For more details please refer to the Commissions' release.

EUROPEAN PARLIAMENT

FISC – report regarding a fair and simpler taxation supporting the recovery strategy

On October 11, 2021, the European Parliament Subcommittee on Tax Matters (FISC) discussed the draft own-initiative report on “Fair and simpler taxation supporting the recovery strategy”.

In the field of direct taxation, the report welcomes the global developments related to the two-Pillar solution on BEPS 2.0 and asks the European Commission to prepare related legislative proposals to implement the agreement as soon as the technical work is completed at IF level. The report also welcomes the Commission’s action plan announced through its May 18 Communication – see ETF 448 – and calls for concrete actions on the initiatives set our therein. Furthermore, the document notes that the Business in Europe: Framework for Income Taxation (BEFIT) initiative should be accompanied by a thorough impact assessment and on-going discussions to ensure the political support needed for the proposal.

The report also contains concrete recommendations as follows:

- the Commission is asked to assess the option of introducing a pan-European corporate income tax regime for certain European companies and start-ups. The system would be optional and the revenues would be allocated to Member States based on an agreed formula;
- the Commission is asked to propose (soft law) initiatives to ensure a more consistent determination of tax residency within the EU. Furthermore, the document calls for an analysis of the Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the EU, with the purpose of identifying gaps and solutions to address existing conflicts and uncertainties when determining the tax residence of both individuals and companies. Depending on the results of the analysis, the report calls for a legislative proposal amending the directive to be issued in 2023.

The draft text will be subject to further negotiations between the members of the European Parliament, with the final aim to adopt it in the form of a resolution.

FISC public hearing on the impact of national tax reforms on the EU economy

On October 11, 2021, the FISC sub-committee held a public hearing on “the impact of national tax reforms on the EU economy”. The hearing acknowledged the delicate balance between the Member States’ sovereign right to decide on their tax policy, and the increased need of tax policy coordination and cooperation between EU countries and tax authorities. In the view of the speakers, such coordination would benefit the internal market, by increasing legal certainty, decreasing the risk of double taxation, streamlining the process of obtaining tax refunds, and reducing loopholes which might facilitate aggressive tax planning. Additionally, the European Commission representative in charge for the annual report "taxation trends in the EU”, Ana Xavier, presented the state of play of national tax reforms in the EU.

For more details please refer to the the speakers’ statements or watch the replay of the debate.

OECD and other International Institutions

OECD

OECD/G20 Inclusive Framework Agreement on BEPS 2.0 – digital services taxes update

On October 21, 2021, Austria, France, Italy, Spain, and the United Kingdom on one hand, and the United States on the other hand, reached a compromise agreement in relation to the interplay of their national digital services taxes (DST) with Pillar 1.

The agreement allows the five European jurisdictions above to maintain their DSTs until Pillar 1 enters into force. Nevertheless, transitional measures would apply starting January 1, 2022, until the earlier of December 31, 2023 or the date of entry into force of a multilateral convention implementing Pillar 1.

In short, during this period, to the extent that DST liabilities accrued exceed an amount equivalent to the tax due under Pillar 1 in the first full year of Pillar 1 implementation (prorated to achieve proportionality with the length of the transitional period), the excess would be creditable against certain future Pillar 1 "Amount A" liabilities. In return, the US will terminate its trade retaliation in relation to the DSTs listed above.

For more details please refer to the US Department of Treasury's press release.

Status update on BEPS Action 13 – Country-by-Country Reporting and Action 14 – Mutual Agreement Procedure

On October 18, 2021, the OECD issued a release regarding the status of implementation of the Base Erosion and Profit Shifting (BEPS) Action 13 on the transparency of global operations of large multinationals and BEPS Action 14 on the resolution of tax-related disputes between jurisdictions.

The 2021 BEPS Action 13 release reflects the outcome of the fourth review of how jurisdictions implemented the Country-by-Country (CbC) reporting requirements, looking at the domestic legal and administrative framework, the exchange of information framework, and the confidentiality and appropriate use of CbC reports. Key findings include:

- over 100 jurisdictions have introduced CbC reporting legislation, and the rules introduced are reportedly consistent with the Action 13 minimum standard;
- the remaining IF members are currently working at finalizing the domestic CbC reporting framework;
- many recommendations made in the first three peer review reports have been addressed.

The next peer review report is expected to be issued in the third quarter of 2022.

The BEPS Action 14 release consists of stage two peer review monitoring reports for Brazil, Bulgaria, China, Indonesia, Russia, Saudi Arabia and Hong Kong (SAR), China. The reports evaluate the progress made by these jurisdictions in implementing recommendations resulting from the stage one peer review.

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

African Tax Administration Forum

ATAF statement on the OECD/G20 Inclusive Framework Agreement on BEPS 2.0

On October 8, 2021, the African Tax Administration Forum (ATAF) issued a statement on the recent IF Agreement on the two-Pillar solution of the BEPS 2.0 project – see ETF 458.

The ATAF release reiterated their support of the initiative and acknowledged that the current version of the two-Pillar solution reflects several changes suggested by the ATAF. In particular, the document welcomed the introduction of an elective binding dispute resolution mechanism related to "Amount A" disputes, applicable for developing countries that are eligible for deferral of their BEPS Action 14 peer review and have no or low levels of disputes under the Mutual Agreement Procedure (MAP).

The organization also reiterated its concern regarding the current technical solution for the reallocation of profits to market jurisdictions. ATAF had previously suggested that the profit reallocation should take into account routine profits (instead of the residual profits), or at least a percentage amounting to 35 percent of the residual profits (instead of the 25 percent agreed by the IF).

In terms of the Pillar 2 solution, ATAF welcomed the IF agreement to widen the scope of the subject to tax rule (STTR) to payments of interest, royalties, and a defined set of other payments. In their view, the final technical solution should ensure that service payments are included in the scope of STTR.

For more details please refer to ATAF's statement.

Local Law and Regulations

Ireland

Tax measures in the Finance Bill 2021

On October 21, 2021, the Irish government published Finance Bill 2021. In the field of direct taxation key changes include, *inter alia*:

- a commitment to introduce a 15 percent minimum effective rate of tax for businesses with consolidated group turnover above EUR 750 million alongside a reaffirmation of the Government's commitment to the 12.5 percent tax rate for businesses with a consolidated group turnover below EUR 750 million;
- the introduction of the interest limitation rule (limiting tax deductible net borrowing costs to 30 percent of EBITDA, with certain exceptions), as provided by the EU Anti-Tax Avoidance Directive (ATAD) 1. Previously, Ireland had taken the position that its existing measures provided equivalent effect, and had deferred adoption of an ATAD interest limitation rule;
- the introduction of anti-reverse hybrid rules as part the domestic implementation of ATAD 2, as well as several technical changes to the Irish anti-hybrid rules which were introduced in Finance Act 2019. The Irish tax authorities had previously conducted a public consultation on the implementation of the interest limitation rule and the anti-reverse hybrid rules – see E-news 136;
- certain non-resident companies receiving Irish-sourced rental income would become subject to Irish corporate income tax. This would result in the Irish 25 percent tax corporate income tax rate for passive income being levied, instead of the current 20 percent withholding tax;
- a revision of the transfer pricing rules, including the application of the OECD's guidelines for attribution of profits to a permanent establishment for the purpose of computing the profits of an Irish branch of a non-resident company;
- changes to the accelerated capital allowances scheme for energy efficient equipment to exclude from the relief investment in equipment directly operated by fossil fuels;
- refundable corporation tax credit to be introduced at a rate of 32 percent for eligible expenditure incurred (capped at EUR 25 million per project) on the design, production and testing of a digital game (subject to EU state aid approval being granted);
- the bank levy (which was due to expire in 2021) to be extended to 2022 (certain exemptions apply).

For more details please refer to the dedicated webpage prepared by KPMG in Ireland.

Malta

Tax measures in the 2022 budget

On October 11, 2021, the Maltese government presented the budget for 2022. The proposed initiatives include a temporary measure for the year of assessment 2022, based on which entities with excess capital allowances as a result of losses incurred because of the COVID-19 pandemic may transfer such losses to other group companies.

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

Mauritius

Mauritius exits the FATF list of jurisdictions under increased monitoring

In the October 2021 Plenary, the Financial Action Task Force (FATF) concluded that Mauritius would no longer be subject to increased monitoring by the FATF.

The European Commission previously confirmed that removal of Mauritius from the FATF list of jurisdictions under increased monitoring will also lead to delisting of Mauritius from the European Union list of high-risk third countries for anti-money laundering/countering the financing of terrorism purposes.

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

Netherlands

Additional proposed amendments regarding corporate income tax rate, earnings stripping rules

On October 15, and October 5, 2021, respectively, the Dutch government presented additional amendments to the measures announced on Budget Day (September 21) – see E-news 140.

The new proposals include:

- an increase of the top corporate income tax rate to 25.8 percent (from 25 percent);
- tighter limitations on the interest deduction ("earnings stripping measure") for corporate income tax purposes. In short, interest expenses would only be deductible up to 20 percent of the EBITDA (currently the threshold is 30 percent);
- a technical clarification of the applicability of withholding tax on payments made to hybrid entities. As a result, an additional withholding tax exemption would be introduced, under which hybrid entities will not be subject to withholding tax provided none of the participants has a qualifying interest in the hybrid entity. If enacted, this measure would apply retroactively starting January 1, 2021.

For more details see a KPMG TaxNewsFlash.

Poland

"Polish Deal" – update regarding legislative status

In October, 2021, the tax bill enacting the so-called "Polish Deal" tax package was passed by the lower house of the Polish parliament. The next step in the legislative process is the approval from the Polish Senate. If enacted, most measures are expected to be effective from January 1, 2022.

As previously reported – see E-news 138, the bill includes significant corporate income tax changes, such as a new “Polish holding company” regime, rules regarding the place of effective management, a minimum corporate income tax, provisions limiting the shifting of the profits to related entities from “low-tax” jurisdictions, anti-abuse provisions targeting hidden dividends, innovation reliefs, and a reform of the transfer pricing rules. The bill would also include amendments to the withholding tax collection system – see E-news 140.

For more details please refer to an overview of all proposed measures prepared by KPMG in Poland.

United Arab Emirates

User guide for appeals under economic substance regulations

The United Arab Emirates (UAE) tax authorities – which are entitled to conduct economic substance audits, impose penalties, and decide on appeals, have started to issue administrative penalties for non-compliance with the economic substance regulations. As previously reported, the UAE introduced minimum economic substance requirements in 2019, and related notification requirements were enacted on June 2, 2020 – see E-news 119.

In order to assist taxpayers impacted by the economic substance audits, the tax authorities have issued an user guide providing details on economic substance requirements appeal procedures – such as grounds for filing an appeal, overview of the process, timeliness, as well as how to deal with technical issues when submitting the economic substance notification.

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

Local Courts

United Kingdom

Closure notices for transfer pricing enquiries, despite ongoing diverted profits tax review

The First-tier Tribunal directed HM Revenue & Customs (HMRC) to issue closure notices in relation to transfer pricing enquiries despite ongoing diverted profits tax review.

In the case at hand – [2021] UKFTT 353 (TC), several subsidiaries (the taxpayers) in a global energy and commodity trading group, applied to the First-tier Tribunal for closure notices with regard to HMRC enquiries into corporation tax self-assessment returns filed by those companies for the accounting periods ended December 31, 2016-2018. The closure notices were requested to bring HMRC enquiries to a conclusion. The enquiries related to the determination of whether arm’s length prices were charged for the services supplied by two UK group companies to an associated enterprise in Switzerland. The impetus for these enquiries and the diverted profits tax notices was a request from the applicants for a bilateral UK-Switzerland advance pricing agreement (APA) in 2015, shortly before a previous unilateral APA was due to expire.

HMRC closure notices could then be appealed if the taxpayers disagreed with the quantum of the adjustments and any related litigation would be a corporation tax — rather than a diverted profits tax — matter.

For more details please refer to KPMG TaxNewsFlash.

KPMG Insights

EU Financial Services Tax perspectives webcast – replay now available

The replay from KPMG's "EU Financial Services Tax perspectives" webcast is now available on KPMG's Future of Tax & Legal webcast series page.

This webcast shared 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.

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

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

- Visit our website for earlier editions

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