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E-News from the EU Tax Centre

Issue 145 – December 21, 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

Advocate General proposes annulment of Commission decision on Luxembourg transfer pricing ruling

On December 16, 2021 Advocate General (AG) Priit Pikamäe of the Court of Justice of the European ("CJEU" or "Court") gave his opinion in the cases C-898/19 P (Ireland v Commission) and C-885/19 P. Both cases concern the validity of a 2015 decision issued by the European Commission (the "Decision"), which found a transfer pricing ruling granted by Luxembourg to be incompatible with EU State aid rules. In 2019 the General Court of the EU confirmed the validity of the Decision.

In the appeal before the CJEU, brought forward by Ireland, the AG concludes that the previous ruling issued by the General Court infringes the provisions governing the division of

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competences between the EU and the Member States. As a result, the AG recommends that the CJEU sets aside the judgment of the General Court, allows Ireland's appeal and annuls the Decision. On the other hand, the AG recommends that the appeal brought by the taxpayer in the case C-885/19 P should be dismissed.

For more information, please refer to Euro Tax Flash Issue 462.

CJEU decision on relief from Italian mortgage registration tax and land registry fee

On December 16, 2021, the CJEU published its decision in joined Cases C-478/19 and C-479/19 on relief from Italian mortgage registration tax and land registry fee that have to be paid out when acquiring property. Under Italian law, a 50 percent reduction in mortgage registration tax and land registry fee applies to closed-end real estate investment funds, but not to open-end real estate investments funds (REIFs). AG Hogan had previously concluded that the challenged provision breaches EU law, unless justified by the need to safeguard the relevant real estate market against systemic risk – see E-news 127.

The CJEU agreed with the AG that the case has to be examined in the light of the free movement of capital only, as the plaintiff – a German REIF – acquired buildings in Italy as a passive investment, and not in order to establish an economic activity. The Court considered whether the Italian provisions differentiate between resident and non-resident entities in objectively comparable situations. Firstly, the CJEU noted that the domestic provision – where relief is available based on the form of the real estate fund, does not in itself differentiate between resident and non-resident funds. However, based on settled case-law, even legislation which differentiates based on objective criteria may lead to a de facto disadvantage in a cross-border situation. In this case, based on domestic law, Italian real estate funds can only be established in the form of closed-ended funds and can therefore benefit from the reduction. On the other hand, the relief is denied to real estate investment funds established in other Member States that are set up as open-ended funds. Consequently, the CJEU agreed with the AG that the challenged provision can discourage open-ended funds from acquiring commercial property in Italy, and thus represents a restriction of the free movement of capital. The Court also concluded that, for the purposes of the challenged provision, resident and non-resident real estate funds are in a comparable situation.

Lastly, the CJEU analyzed if the restriction can be justified by an overriding reason in the public interest. Whilst rejecting arguments based on the need to combat tax evasion and avoidance, as well as the need to preserve the coherence of the tax system, the Court noted that the restriction might be justified by the objective of limiting systemic risks on the real estate market. However, it would be up to the referring court to analyze if the challenged provision meets this objective and – if the restriction is justified, if it does not go beyond what is necessary to achieve it, i.e. whether it is proportionate.

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EU Institutions

EUROPEAN COMMISSION

European Commission releases work program for 2022

On December 14, 2021, the European Commission published its indicative work program for the first half of 2022. From a direct tax perspective, the main topics listed on the timetable include:

- December 22, 2021: An initiative to fight the use of shell entities, as previously reported in Euro Tax Flash Issue 449;
- December 22, 2021: A proposal on the implementation of the OECD global agreement on minimum effective taxation (i.e. the Pillar Two Directive), as previously reported in Euro Tax Flash Issue 458;
- April 13, 2022: A proposal for a Debt Equity Bias Reduction Allowance (the DEBRA proposal), further details of which were reported in Euro Tax Flash Issue 448;
- July 27, 2022: A proposal on the implementation of the OECD global agreement on the re-allocation of taxing rights (i.e. a proposal on Pillar One of the OECD BEPS 2.0 agreement).

The indicative deadlines in the Commission work program represent a slippage from previous deadlines proposed for some measures, most notably DEBRA (which was initially planned for the first quarter of 2022) and the proposal on Pillar One (which had been expected in June 2022). The December 22 deadline for a proposed directive on Pillar Two has remained unchanged and is expected to be met given that the Pillar Two Model Rules were published by the OECD on December 20.

For more information, please refer to the European Commission work program.

COUNCIL OF THE EU

France announces priorities for presidency of the Council of the EU

On December 9, 2021, the French President, Emmanuel Macron, and the French Minister of State for European Affairs, Clément Beaune, held a press conference in which the French policy objectives for the French Presidency of the Council of the EU were announced. From a tax perspective, one of the headline priority objectives announced includes the establishment of the Carbon Border Adjustment Mechanism (CBAM).

In addition, the speech noted that an international agreement on the taxation of multinationals has been agreed at OECD level and that the French Presidency's agenda will seek to ensure the implementation of this agreement at European level, with the texts needed to implement the OECD Pillar One and Pillar Two proposals to be examined by the Economic and Financial Affairs Council by Spring 2022.

For more information, please refer to the dedicated website of the French Presidency of the Council of the EU.

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OECD and other International Institutions

OECD

Release of Pillar Two model rules

On December 20, 2021, the OECD/G20 Inclusive Framework published model rules for the Global Anti-Base Erosion Rules (GloBE) as part of its Two-Pillar solution to address the tax challenges arising from the digitalisation of the economy. Under the GloBE Rules large multinational enterprise shall be required to pay a minimum level of tax by imposing a top-up tax on profits arising in a jurisdiction whenever the effective tax rate is below the minimum rate.

The published model rules provide a template defining the scope and setting out the operative provisions and definitions for jurisdictions to translate into domestic law. The GloBE Rules are to be brought into domestic legislation as from 2022 as part of a common approach and to be effective in 2023 for the Income Inclusion Rule and 2024 for the Under-Taxed Payments Rule.

In a press release the OECD also noted that:

- the model rules will be supplemented by a Commentary in early 2022 which will also clarify the co-existence of GloBE Rules with the US GILTI provisions;
- a public consultation event in respect of the GloBE Rule implementation framework is planned for February 2022;
- model rules for a Subject to Tax Rule and a multilateral instrument for its implementation are currently being developed and will be released in the early part of 2022;
- a public consultation event in respect of the Subject to Tax Rule will be held in March 2022.

For more details please refer to a TaxNewsFlash and the OECD's release.

BEPS Action 5 peer review report on tax rulings

On December 14, 2021, the OECD/G20 Inclusive Framework on BEPS published the 2020 peer review in relation to the spontaneous exchanges of information on tax rulings based on the renewed peer review process agreed by the Inclusive Framework on February 22, 2021 (for previous coverage please refer to E-News Issue 127).

Key findings from this fifth annual peer review of in total 131 jurisdictions include:

- Since the start of the review process in 2016 almost 22,000 in-scope tax rulings have been issued by the jurisdictions being reviewed, with over 1,700 tax rulings being issued in 2020.
- Over 41,000 exchanges of information took place up to December 31, 2020, with approximately 5,000 exchanges being undertaken in 2020.
- Out of the 131 jurisdictions reviewed, 95 jurisdictions are assessed as fully compliant with the BEPS Action 5 minimum standard, with the remaining 36 jurisdictions receiving one or more recommendations to improve their legal or operational framework.

For more information please refer to OECD's release.

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Local Law and Regulations

Belgium

Proposed amendments to the Belgian expat regime

On December 1, 2021, further changes were announced with respect to the proposed revision of the Belgian expatriate tax regime to be applicable as from January 1, 2022 (for previous coverage please refer to E-News Issue 143). Key measures of the new regime include:

- qualifying expatriates benefit from a lump sum tax exemption with respect to repayments for recurring expenses arising directly from secondment or employment in Belgium;
- qualifying expatriates no longer benefit from tax-free travel exclusions for days worked abroad;
- taxpayers who qualify for the expatriate tax regime will be subject to normal residence rules, unless they can prove they are resident in another country (e.g., their home country);
- the new regime will be applicable for a period of five years, with the possibility for extending it by three years.

The new regime is still a draft that has to be voted on in Parliament before it becomes law. It is expected that the law on the new expatriate tax regime will be published in the Belgian Official Gazette by the end of December 2021.

For more detailed information, please refer to a report prepared by KPMG Belgium.

New reporting requirements of financial institutions

Under a new reporting obligation, Belgian financial intermediaries are required to report by January 31, 2022 the following information with respect to calendar years 2020 and 2021:

- the amounts that are held by their clients on bank and payment accounts; and
- the value of certain financial contracts (e.g. securities accounts and certain insurance contracts).

As a result of this new periodic reporting obligation, the tax authorities will receive information on the amounts held by individuals and companies with a Belgian financial intermediary.

Fore detailed information, please refer to a report prepared by KPMG Belgium.

Cyprus

Planned increase of corporate income tax rate

On December 9, 2021, the Cypriot Minister of Finance presented the Government’s 2022 budget plan to the Parliament. The budget plan includes:

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- an increase of the corporate income tax rate from 12.5 percent to 15 percent in light of the OECD Inclusive Framework's agreement on global minimum taxation rules (OECD's Pillar Two solution). According to the Minister, it is not expected that the increase of the tax rate will substantially affect foreign investments in Cyprus due to other comparative advantages that outweigh the tax rate increase.
- the introduction of carbon taxation and environmental levies.

According to the Minister, the reforms are still at a premature stage and a legislative budget proposal is to be finalized in 2022.

Finland

President signs law implementing ATAD reverse hybrid mismatch provisions

On December 16, 2021, the Finnish President signed the law for the implementation of anti-reverse hybrid mismatch rules as per the EU Anti-Tax Avoidance Directive (ATAD) 2.

For previous coverage please refer to E-news issue 142.

France

Guidance on hybrid mismatch rules

On December 15, 2021, the French tax authorities published guidance on hybrid mismatch and reverse-hybrid mismatch rules implementing the corresponding provisions of the Anti-Tax Avoidance Directive (ATAD). The guidance provides clarifications in respect of:

- definitions of terms used in the rules;
- scope of these rules; and
- corrective measures.

The French rules are applicable from January 1, 2020 (in respect of hybrid mismatches) and from January 1, 2022 (in respect of reverse hybrid mismatches).

Greece

Guidance on tax break regime to individuals transferring their tax residency to Greece

On December 1, 2021, the Greek tax authorities published guidance on a special tax regime, which provides that individuals who, under certain conditions, transfer their tax residence to Greece will be eligible for an income tax and solidarity contribution exemption of 50 percent in respect of their employment income earned in Greece during any tax year. The new guidance provides a number of clarifications, including:

- the regime applies exclusively to "new recruitments";
- executives seconded to Greek companies, as well as appointed directors of all types of Greek companies may qualify as "new recruits";
- the company's overall number of employees should be increased for at least 12 months following the "new recruitment";

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- the regime applies only to employment income, which is sourced in Greece and is generated from a qualifying new recruitment.

For general information on this regime please refer to a report prepared by KPMG Greece.

Luxembourg

Effects of the 2022 Tax Plan on corporate income taxation

As part of the Tax Plan 2022 bill, on December 16, 2021, Luxembourg adopted the revision of the municipal business tax rules in respect of distributions from Controlled Foreign Companies (CFC). CFC income is only subject to the corporate income tax (i.e. CFC income not subject to municipal business tax), while actual distributions from CFCs are to be excluded from corporate income tax base in order to avoid double taxation but to be added back to the municipal business tax base.

The Tax Plan 2022 was published on October 13, 2021 and provides for the following additional corporate income tax measures:

- the current corporate income tax rules with respect to tax rates, incentives, credits, taxable income and abuse measures will remain in force. However, the tax due is increased by a seven percent surcharge for the employment fund;
- group taxation rules will require all companies within a tax group to apply the same international reporting standards or domestic GAAP.

As a last step, the bill will be signed by the Duke and gazetted. The above mentioned measures will be effective as from January 1, 2022.

For more information, please refer to a tax alert prepared by KPMG Luxembourg.

Netherlands

Amended proposal concerning final settlement of dividend withholding tax for cross-border reorganizations

On December 8, 2021, a revised bill was presented to the Lower House of the Dutch Parliament which provides for the introduction of a final dividend withholding tax settlement obligation. This obligation shall apply to cross-border reorganizations by companies established in the Netherlands (head offices) with a distributable profit of more than EUR 50 million at the time of the reorganization. The introduction of the measures is proposed with retroactive effect as of December 8, 2021.

For more details please refer to a report prepared by the KPMG member firm in the Netherlands.

Proposed options to address dividend stripping

On December 15, 2021, the Dutch Government launched an internet consultation on options for strengthening measures to prevent dividend stripping that are used to avoid dividend taxation.

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The consultation document contains six potential solutions and various general questions in order to identify a measure that will prevent the improper use of dividend stripping without unnecessarily affecting normal stock exchange trading.

For more details please refer to a report prepared by the KPMG member firm in the Netherlands.

Tax proposals in coalition government's agreement

On December 15, 2021, the Dutch Government published its agreed plans and ambitions for the new coalition government. Key corporate income tax measures include a tightening of CFC rules as of 2023 and the implementation of the OECD Pillar Two solution.

In addition, the new coalition plans to take on a leading role in the European Union in the field of combating tax avoidance and tax evasion and to commit to a digital services tax (despite the European Union's plans to replace its proposed digital levy with residual profits reallocated to member countries under the OECD's Pillar One solution).

For more detailed information please refer to a report prepared by the KPMG member firm in the Netherlands.

Poland

As part of the "Polish Deal" reform package (for previous coverage refer to E-News Issues 141 and 144), the scope of the so-called "Estonian corporate income tax scheme" was extended to simple joint-stock companies, limited partnerships, and limited joint-stock partnerships as of January 1, 2022. Previously, the relief was only available for joint-stock companies and limited liability companies.

In principle, the "Estonian corporate income tax scheme" provides for a taxation of profits upon distribution (i.e. taxation deferral) and lower effective tax rates for certain taxpayers.

For more detailed information on the revised "Estonian corporate income tax scheme" please refer to a report prepared by the KPMG member firm in Poland

Spain

Planned reduction of corporate income tax rate for certain non-residents

On December 10, 2021, The Spanish Government proposed the so-called "start-up law" to the Parliament which aims at attracting start-ups and teleworkers.

Under the law proposal, companies that qualify as a start-up shall be subject to a reduced corporate income tax rate of 15 percent (in contrast to regular tax rate of 25 percent) for a maximum of four years after the tax base becomes positive. In addition, the law proposal provides for a reduced nonresident income tax rate for certain individuals working for start-ups.

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Local Courts

Sweden

Swedish Supreme Court judgement on domestic interest deduction limitation rules

On December 13, 2021, the Swedish Supreme Administrative Court (the Court) published its decision in a case (i.e. Swedish Tax Agency v. Husqvarna Holding AB, case no. 659-21) concerning the current local interest deduction limitation rules for intra-group payments. As previously reported – see E-News Issue 134, the Swedish interest deductibility rules have been under the European Commission's scrutiny for several years. Under the rules effective 2013-2018, deduction was restricted if the benefit was the "main reason" for the debt relationship. Following a letter of formal notice received in 2014, Sweden amended the rules in 2019, by narrowing the deductibility restriction to arrangements entered into "exclusively or almost exclusively" for purposes of generating a tax benefit. However, the European Commission concluded that the revised rules continue to be in breach of EU law, and sent an additional letter of formal notice on June 2, 2021.

The plaintiff is a Swedish company that had applied for an advance ruling regarding its right to deduct interest expenses paid to an Irish group company. The company would have been allowed to deduct the interest expenses if the lender had been tax resident in Sweden (the companies would have been covered by the group contribution rules). The Court tested the compatibility of the current Swedish interest deduction rules in light of the Lexel case (C-484/19) – see E-News Issue 124, where the CJEU found the previous provisions, applicable between 2013 and 2018, to be contrary to the freedom of establishment. The Swedish Court concluded that the current rules continue to create a different treatment in comparable situations, thereby restricting the freedom of establishment. The Court also rejected possible justifications (the need to prevent tax avoidance or abuse, the need to ensure a balanced allocation of taxing), on the grounds that the rules could capture transactions that are conducted under market terms, and consequently the rule is not aimed at purely artificial or fictitious arrangements.

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

KPMG Insights

The path ahead for BEPS Pillar 1 and 2 implementation – Tuesday, January 11, 2022

Tax leaders around the world will soon have the opportunity for more detail and clarity around Pillar 1 and Pillar 2 implementation developments, with an extensive release expected from the Organization for Economic Co-operation and Development's on their Inclusive Framework expected at the end of November.

As part of the Future of Tax & Legal webcast series, KPMG International will host a session on

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Tuesday, January 11, 2022 focusing on “The path ahead for BEPS Pillar 1 and 2 implementation”. Join the webcast for a deep dive that will explore the report in-depth and unpack key considerations for multinationals. Please access the event page to register.

BEPS 2.0: Impact of the proposals for the Middle East

The OECD BEPS 2.0 project proposed a two-pillar approach to international tax reform, with Pillar Two focusing on the introduction of a Global Minimum Tax rate of 15 percent. KPMG Lower Gulf has prepared a summary of the new global minimum tax of 15 percent will affect groups with a consolidated turnover in excess of EUR 750 million in the Middle East. For more information, please refer to the KPMG Lower Gulf dedicated webpage.

Navigating Tax Transparency

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 has prepared a range of supports and leading technology solutions to assist tax departments to accurately compile information on a company’s tax footprint and manage compliance with tax transparency standards and changes.

For more information, please refer to the dedicated KPMG webpage.

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 KPMG’s EU Green Deal Policy Guide which has been developed to summarize the key takeaways from each of the reforms in the European Commission’s ‘Fit for 55’ package of carbon reform measures.

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