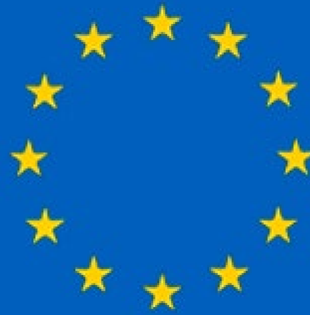

E-News from KPMG's EU Tax Centre

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E-News from the EU Tax Centre

Issue 156 – June 17, 2022

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

General Court decision on the UK tax treatment of multinational groups under CFC regime

On June 8, 2022, the General Court of the European Union (General Court or the Court) gave its decision in the joined cases T-363/19 and T-456/19, concerning the compatibility of the UK Controlled Foreign Companies Group Finance Company Partial Exemption Rules ("Finco Exemption") with EU

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State aid rules.

The Court ruled that the Commission was correct to conclude that the Finco Exemption gave an unfair tax advantage to certain UK tax resident companies and therefore violated EU State aid rules. The Finco Exemption under dispute was applicable for non-trading financing profits derived by a controlled foreign company (CFC) in circumstances where the profits arose from lending activities performed in the UK.

For more information, please refer to Euro Tax Flash Issue 477.

EFTA

Norwegian group relief under the interest deduction rules incompatible with the EEA agreement

On June 1, 2022, the European Free Trade Association (EFTA) Court (the Court) rendered its decision on whether the interaction between the Norwegian group contribution and the domestic interest limitation rules infringes the freedom of establishment. Under domestic tax rules applicable in 2014 and 2015, if a certain threshold was exceeded, i.e. NOK 5 million (approx. EUR 479,000), the deductibility of interest paid to related parties was limited to an amount equal to 30 percent of taxable ordinary income adjusted for the value of tax depreciation and net interest expenses for tax purposes (EBITDA). Additionally, a group contribution relief was available for group contributions from Norwegian companies, but not from other EEA affiliated parties, resulting in an increase in the recipient company's EBITDA and therefore also an increase in the maximum deduction for interest. The group contribution deduction had previously been found as contrary to the freedom of establishment by the EFTA Surveillance Authority, but the Norwegian authorities disagreed with the finding.

The plaintiff was a Norwegian company that was financed by its Luxembourg parent company through a mix of equity and debt. The Norwegian tax authorities rejected the taxpayer's claim to fully deduct the interest expenses on the grounds that the group contribution relief was not applicable to cross-border investments. According to the plaintiff, full deductibility would have been available if the contribution would have been made by a Norwegian parent. Following an appeal brought forwarded by the plaintiff the case was referred to the EFTA Court.

The Court noted that, in order to apply the group contribution rules, both the recipient and the transferor had to be Norwegian companies. The Court continued by recalling its settled case-law, based on which a difference in treatment between domestic subsidiaries, based on the location of their parent companies, constituted an obstacle to the freedom of establishment, if it makes it less attractive for EEA companies to establish subsidiaries in that EEA State. In the Court's view, the measure under dispute precluded Norwegian companies part of an EEA group to reduce the impact of the interest limitation rules, and therefore cross-border investments were disadvantaged as compared to domestic investments. Moreover, the Court found that a foreign EEA-based company in a group with a Norwegian-based company is in a comparable situation to that of a Norwegian-based company in a group with another Norwegian-based company. Based on these considerations, the Court concluded that the measure under dispute restricts the freedom of establishment.

The Court continued by analyzing whether the restriction arising from the measure under dispute may be justified by overriding reasons in the public interest. The Court took the view that the measure may be justified if it aims to prevent tax avoidance through wholly artificial arrangements. However, in order to comply with the principle of proportionality, the measure should not go beyond what is necessary to achieve its objective, and should provide the taxpayer the opportunity to demonstrate that the transactions were performed at arm's length. The Court noted that it is up to the referring court to

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determine if the measure under dispute provides this opportunity for taxpayers.

Infringement Procedures and CJEU Referrals

Commission sends reasoned opinion to Portugal in respect of Fifth Anti-Money Laundering Directive

On May 19, 2022, the European Commission sent a reasoned opinion to Portugal over a failure to fully transpose the Fifth Anti-Money Laundering Directive (AMLD) into Portuguese domestic law as part of its May 2022 infringements package. While Portugal had declared that it had fully transposed the Directive into law, the Commission disagrees with this assessment, highlighting deficiencies in the following areas:

- the obligations of credit and financial institutions in relation to anonymous prepaid cards issued in third countries;
- information to be obtained on business relationships or transactions, involving high-risk third countries; and
- the accessibility of the information on the beneficial ownership of a trust or a similar legal arrangement.

If Portugal does not provide a satisfactory response to the Commission within two months, the Commission may decide to refer the Member State to the CJEU.

EU Institutions

EUROPEAN COMMISSION

Commission recommendation to Luxembourg and Malta to limit aggressive tax planning

On May 23, 2022, the European Commission issued country-specific recommendations for each of the 27 EU Member States as part of the European Semester Spring Package. Within the country-specific recommendations for Luxembourg and Malta, the Commission recommended that efforts are continued to curb aggressive tax planning and tax evasion.

In particular, while the Commission noted steps taken by Luxembourg in respect of withholding taxes on outbound payments, the Commission viewed the measures taken to date as being insufficient and recommended that further steps are taken particularly in respect of intra-group financing and treasury activities, most notably by ensuring adequate taxation of outbound payments of interest and royalties to low or zero-tax jurisdictions.

Similarly for Malta, while the Commission noted that steps have been taken – including the initiation of an independent study on outbound and inbound payments under Malta’s Recovery and Resilience Plan, the Commission recommended that additional measures are taken in respect of outbound payments of dividends, interest and royalties, as well as in respect of the Maltese tax treatment of non-

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Maltese incorporated companies.

For more information, please refer to the European Commission's press release.

EUROPEAN PARLIAMENT

Draft report requests amendments to the proposal for the "Unshell" Directive

On May 12, 2022, MEPs issued a draft report on the proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes (the Unshell Directive). While the report is generally supportive of the text proposed by the Commission, a number of amendments are recommended, including:

- Changes to the threshold criteria in the gateway tests in Article 6(1) of the proposed Directive, including increasing the relevant income gateway to 80 percent from the current 75 percent threshold, a decrease in the asset test to 55 percent from 60 percent and an increase in the cross-border gateway threshold from 60 percent to 65 percent;
- Amending the outsourcing gateway criteria in Article 6(1) to limit the scope to services qualifying as outsourced to those received from non-associated enterprises;
- Changes to the exclusions provided for in Article 6(2) of the proposed Directive, including an expansion of the exclusion for regulated financial undertakings to also include subsidiaries of regulated financial undertakings which have the objective of holding assets or investing funds;
- Clarification that the exclusion for undertakings with at least five own full-time equivalent employees in Article 6(2) of the proposed Directive should only include employees that are working in the jurisdiction where the undertaking is resident for tax purposes;
- Removal of the option in Article 12 of the Directive for Member States to issue a certificate of tax residence with a warning declaration to entities that are deemed to be a shell entity;
- A reduction in penalties for failing to comply with the Directive from five percent of turnover to 2.5 percent of turnover;
- A deferral of the implementation deadline for Member States from January 1, 2024 to January 1, 2025.

The vote in the Committee on Economic and Monetary Affairs (ECON) is currently scheduled for November 17, 2022. If approved, the report would then be voted on at a plenary session of the European Parliament, at which point it would represent the Parliament's opinion on the Directive (if this vote was also carried). However, it is important to note that the Parliament's opinion is not binding on the Council of the European Union (i.e. it would remain up to the 27 EU Member States to agree on the final text of the Directive).

OECD and other International Institutions

OECD

Public comments received on regulated financial services exclusion under Amount A (Pillar One)

On May 25, 2022 and May 30, 2022, the OECD released comments received on the regulated financial services exclusion under Amount A of the OECD Pillar One solution to reallocate profits of multinational enterprises to market jurisdictions (for previous coverage, please refer to E-News issue 154). The

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OECD received a total of 53 responses, including a response letter submitted by KPMG International, which highlights the following key issues:

- The application of Amount A to the type of financial services businesses described in the consultation document could lead to unintended, illogical, and hence unstable outcomes since the concept of profit margin (profit divided by revenue) is rarely used to measure profitability in the regulated financial services industry and as a measure of profitability is not comparable to other industries. It is also difficult to define and identify the "market" for financial services.
- There is a risk that not excluding certain businesses from the scope of Amount A, notably payment service providers, that compete with businesses that are covered by the regulated financial services exclusion, will create an un-level playing field, introducing unintended market distortions.
- The proposed entity-based approach is complex and will impose significant compliance burdens on taxpayers and tax administrations. MNE groups in the regulated financial services sector have hundreds, if not thousands, of legal entities. The calculations underpinning the activities requirement will need to be updated annually, placing a significant burden on taxpayers and tax administrations. The entity-based approach could be significantly simplified by removing the activities requirement without material detriment to the objectives of the Exclusion.
- Similarly, the application of the Amount A rules to MNE groups that are partially in-scope will also be complex, particularly where bespoke segmentation is required. It is important to ensure that these MNE groups are not disadvantaged, for example, that they are not subject to less generous loss carry-forward rules or a stricter averaging mechanism.
- Recommendation to simplify the administration of the regulated financial services exclusion by providing MNE groups the option to file a return supporting the self-assessment that they are not in-scope of Amount A because of the exclusion and by establishing a rulings process, whereby a taxpayer that files a return could receive certainty that they are not in-scope of Amount A for at least 5 years, subject to certain critical assumptions being met.

For additional information please refer to KPMG's Tax News Flash and the OECD press release.

Public consultation on tax certainty aspects of Amount A (Pillar One)

On May 27, 2022, the OECD/G20 Inclusive Framework on BEPS issued public consultation documents seeking public comments on Tax Certainty Framework for Amount A and Tax Certainty for Issues Related to Amount A under Pillar One.

The Tax Certainty Framework aims at enhancing certainty for in-scope groups and in turn minimizing the risk of uncoordinated compliance by way of the following three mechanisms:

- scope certainty reviews to provide an out-of-scope group with certainty that it is not in-scope of rules for Amount A for a period;
- advance certainty reviews to provide certainty over the methodology applied by a group for specific aspects of the new rules relevant to Amount A; and
- comprehensive certainty reviews to provide in-scope groups with binding multilateral certainty over its application of all aspects of the new rules for a period that has ended.

The three mechanisms would also be supported by a binding Determination Panel process to resolve any potential disagreements. In addition, the Tax Certainty for Issues related to Amount A would provide that in-scope groups would benefit from mandatory binding dispute prevention and resolution mechanisms to avoid double taxation due to issues related to Amount A (e.g., transfer pricing and business profits disputes). An elective binding dispute resolution mechanism would be available only for issues related to Amount A for developing economies that are eligible for deferral of their BEPS

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Action 14 peer review and have no or low levels of mutual agreement procedure disputes.

While the OECD/G20 Inclusive Framework on BEPS agreed to release the documents for public consultation, it has been noted that the documents do not constitute draft Model Rules as is the case in other public consultations on aspects of Amount A. They also do not reflect a consensus across the Inclusive Framework members.

For more information, please refer to KPMG's Tax News Flash and the OECD press release.

Updated transfer pricing country profiles 2021/2022

On June 9, 2022, the OECD released a new batch of updated transfer pricing country profiles that provide information on local transfer pricing legislation and practices including the arm's length principle, transfer pricing methods, comparability analysis, intangible property, intra-group services, cost contribution agreements, transfer pricing documentation, administrative approaches to avoiding and resolving disputes, safe harbors, and other implementation measures.

As part of the new release, the OECD published new transfer pricing country profiles for Egypt, Liberia, Saudi Arabia and Sri Lanka, bringing the total number of available country profiles to 73.

For more details, please refer to KPMG's Tax News Flash.

Update on BEPS MLI

On May 25, 2022, China deposited its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the Multilateral Instrument -"MLI"). The instrument of ratification submitted also covers the bilateral tax treaties of Hong Kong (SAR), China. The MLI will enter into force on September 1, 2022.

On June 1, 2022, the MLI entered into force for Romania and Bahrain. In addition, on June 1, 2022, Estonia and Spain confirmed the completion of their internal procedures for the MLI to enter into force, pursuant to the extension provided under Article 35(7)(b) of the MLI.

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Local Law and Regulations

Denmark

Ruling on permanent establishment risks where an employee works from home

On May 12, 2022, the Danish tax authorities issued a binding statement providing clarifications on when an employee's work from home constitutes a permanent establishment in Denmark for a foreign company.

According to the Danish tax authorities, the work of an employee based in Denmark should create a permanent establishment in Denmark where the employee contributes to the sales of the company, is tasked with developing the Nordic market, is in contact with new potential customers and a considerable amount of the working hours are performed in Denmark (40 to 50 percent in this case).

The Danish tax authorities hold that this assessment is not changed by the fact that the employee does not want to move or to commute to Germany (tax residency of the employer) for private reasons and that only a maximum of 5 percent of the employee's total working hours were related to the Danish market. From the perspective of the Danish tax authorities, this was not sufficient to assume that the employee's personal circumstances were the sole reason for his work performed in Denmark.

Revised plans for the introduction of a levy on revenue for streaming services

On May 21, 2022, the Danish Ministry of Culture announced the introduction of a 6 percent levy on revenue for streaming services in Denmark to be effective from 2024. Earlier this year, an initial proposal had provided for a 5 percent levy (for more information, please refer to E-News issue 148). The collected revenue is supposed to be used to fund the Danish film and television industry.

For an overview of existing, proposed and withdrawn digital services taxes, please refer to KPMG's development summary of the taxation of the digitalized economy.

Finland

Updated guidance on hybrid mismatch rules

On May 27, 2022, the Finnish tax authorities published updated guidance on hybrid mismatch rules in line with the EU Anti-Tax Avoidance Directive 2017/952 ("ATAD 2"). The guidance updates the clarifications previously issued in July 2020 (please refer to E-News issue 120) and provides additional guidelines in respect of the taxation of reverse hybrid entities, including on:

- the concept of limited-liability and reverse hybrid entities;
- the conditions for the application of the rule;
- the conditions for determining 50 percent control threshold;
- the exemption for alternative funds.

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

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Germany

Tax relief measures for coping with the coronavirus crisis adopted

On May 19, 2022, the German Parliament (Bundestag) adopted a bill to implement tax relief measures for coping with the coronavirus pandemic. Key tax measures include the extension of the option to use the declining-balance method of depreciation for movable fixed assets, the extension of the option to carry-back losses and the extension of the filing deadlines for tax returns (for a more detailed overview, please refer to E-News issue 148).

On June 10, 2022, the German Federal Council (Bundesrat) also approved the law. As a next step, the law must be published in the Federal Law Gazette.

For more details, please refer to a report prepared by KPMG in Germany.

Guidance on the repayment of contributions for third-country corporations

On April 21, 2022, the German Ministry of Finance issued guidance on repayments of contributions by corporations domiciled in non-EU countries. Under German law, repaid contributions are exempt from tax for shareholders under certain conditions while dividends may be, at least in part, subject to taxation depending on the legal form of the shareholder. The new guidance provides that the tax exemption for repaid contributions can also apply to non-EU corporations where the repayment relates to nominal capital, which can be substantiated by suitable documents (in particular the resolution on the nominal capital reduction and repayment).

For more details, please refer to a report prepared by KPMG in Germany.

Greece

Public consultation on anti-hybrid mismatch rules launched

On May 30, 2022, the Greek Ministry of Finance launched a public consultation on the draft legislation to implement anti-hybrid mismatch rules into national law, in line with ATAD 2.

The deadline for submitting feedback was June 14, 2022. Subject to approval, the rules will apply retroactively from January 1, 2022.

Tax exemption for certain business reorganizations introduced

On May 16, 2022, a new law was published in the Greek Official Gazette, which includes an income tax exemption of 30 percent for profits of a newly formed company following a business reorganization. The exemption applies for a maximum of nine years and is subject to certain conditions in relation to the size, turnover and number of employees of the new company.

For more information, please refer to E-News issue 155 and a report prepared by KPMG in Greece.

Hungary

Windfall tax on oil companies and surtax on other industries adopted

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On June 4, 2022, the Hungarian Government adopted a decree to impose extra profit surtaxes on certain industries and to extend the scope of the financial transaction tax to finance relief measures against rising inflation and energy prices and military spending.

Key tax measures of the decree include:

- Surtax on credit institutions and financial enterprises on net turnover (10 percent in 2022 and 8 percent in 2023).
- Surtax on producers of petroleum products, on the price difference between a specific world market price and the purchase price of crude oil originating from Russia multiplied by the quantity of barrels of crude oil purchased in Russia in the actual month (25 percent in 2022 and 2023).
- Surtax on certain renewable power plants on certain profits (65 percent in 2022 and 2023).
- Financial transaction tax on the purchase by investment companies and credit institutions of certain financial instruments and on the provision of payment services, credit and loan provision, currency exchange and mediated currency exchange services provided by service providers as a cross-border service in Hungary (0.3 percent tax rate, capped at HUF 10,000 (approx. EUR 25) per purchase transaction).

The provisions will generally apply from July 1, 2022. For more information, please refer to a report prepared by KPMG in Hungary.

Ireland

Public consultation launched on the implementation of the OECD Pillar Two proposal

On May 26, 2022, the Irish Department of Finance launched a public consultation seeking stakeholder views on the implementation of the OECD Pillar Two Minimum Tax Rate proposal in Ireland. The consultation period will run until July 22, 2022.

The consultation seeks comments on the impact of introducing a 'qualified domestic top-up tax' in Ireland. In addition, the consultation contains a number of questions on the following topics related to the implementation of the GloBE rules into Irish domestic legislation, including:

- whether there are specific features of the GloBE rules that have implications for or would require amendments to be made to Ireland's tax code;
- whether there is a need for additional clarification on the scope of the rules;
- how the charging provisions (Income Inclusion Rule (IIR) and Undertaxed Profits Rule (UTPR)) should be reflected in Irish domestic legislation;
- how the calculations of GloBE Income or Loss, Adjusted Covered Taxes, the Effective Tax Rate and Top-Up Tax should be completed; and
- the treatment of Qualified Refundable Tax Credits.

In addition, the consultation includes questions regarding the treatment of large-scale domestic groups as well as the application of the transition rules and administration provisions.

For more information, please refer to the Irish Department of Finance press release.

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Italy

Windfall profit tax introduced

On May 17, 2022, a package of tax measures was published in the Official Gazette to provide relief from rising inflation and energy prices including a windfall profit tax at a rate of 10 to 25 percent on certain energy companies to fund the related relief measures (for previous coverage, please refer to E-News issue 151).

The windfall profit tax applies where profits generated between October 1, 2021 and April 30, 2022 exceed the profits generated between October 1, 2020 and April 30, 2021 by at least EUR 5 million (excess profits), along with an increased profit margin of at least 10 percent.

The law further provides that 40 percent of the windfall profit tax is due by June 30, 2022 while the balance should be paid by November 30, 2022. It is also clarified that the tax is not deductible for corporate income tax purposes.

Beneficial ownership register introduced

On May 25, 2022, a Ministerial Decree on the implementation of a beneficial ownership register in relation to Article 31 of the Fifth Anti-Money Laundering Directive was published in the Official Gazette.

The Decree requires the Italian Ministry for Economic Affairs to adopt a provision in respect of the operation of the beneficial ownership register. Once effective, Italian based legal entities, including business corporations, associations, foundations or trusts will be required to provide relevant information on their beneficial owners within a timeframe of 60 days.

Guidance on the application of the arm's length principle issued

On May 24, 2022, the Italian tax authorities issued guidance on the application of arm's length principle. The guidance includes the following clarifications:

- The relevant arm's length range is to be defined in line with the OECD Transfer Pricing Guidelines.
- Where all identified transactions are equally comparable, any value within the arm's length range as derived from the transactions can be taken into account.
- Where the identified transactions do not provide for sufficient comparability, one should refer to a narrower range (e.g. the interquartile range) and use statistical tools to increase the reliability.
- The application of the median of the range should be limited to situations where the range does not include values with a sufficient comparability and where the use of the statistical tools does not increase reliability.

Luxembourg

Approval of draft DAC7 legislation

On June 1, 2022, a draft law was approved by the Luxembourg Council of Ministers to transpose the Council Directive (EU) 2021/514 (DAC7) into Luxembourg domestic law. The law would require digital platform operators to provide the Luxembourg tax authorities with information about certain users (“sellers”) on their platform to enable the Luxembourg tax authorities to exchange this information with

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other EU Member States.

Following this approval, the draft law will now be sent to the Luxembourg Chamber of Representatives for approval. To comply with DAC7, the domestic legislation must be implemented by December 31, 2022 and the rules need to be applied from January 1, 2023.

For more information, please refer to the press release of the Luxembourg Government.

Updated guidance on non-deductible payments to non-cooperative jurisdictions

On May 31, 2022, the Luxembourg tax authorities issued an updated Circular relating to defensive measures applicable for payments made to non-cooperative jurisdictions. With effect from March 1, 2021, payments of interest and royalties made to a related enterprise in a territory that is on the EU list of non-cooperative jurisdictions should be treated as being non-deductible for Luxembourg tax purposes, unless the payment qualifies for an escape from the rules.

The new Circular provides guidance on the meaning of interest and royalties for the purposes of the rules, the conditions which must be satisfied for a royalty or interest payment to be considered non-deductible and the types of records that must be retained by the entity making the payment. In line with the previous version of the Circular, the guidance requires taxpayers to disclose transactions with taxpayers in non-cooperative jurisdictions as part of the Luxembourg tax return.

For more details on defensive measures adopted by EU Member States against non-cooperative jurisdictions, please refer to KPMG's summary of proposed or enacted measures.

New income tax treaty signed with the United Kingdom

On June 7, 2022, a new Luxembourg / UK double taxation agreement (DTA) was signed. The new DTA will enter into force once both countries have ratified the text and exchanged the ratification instruments.

Key changes in the new DTA include:

- amendments to the definition of tax residence under Article 4 of the DTA;
- amendments to the treatment of tax surcharges under Article 9 of the DTA;
- an exemption from dividend withholding tax for distributions made otherwise than from profits derived from immovable property under Article 10 of the DTA (the existing treaty provides for a five percent withholding tax rate);
- an exemption from withholding tax on royalty payments under Article 12 of the DTA (the existing treaty provides for a five percent withholding tax rate);
- amendments to the capital gains article of the DTA (Article 13) to expand the taxing rights of the other contracting state to allow taxation where capital gains on shares, which derive more than 50 percent of their value from immovable property in that other contracting state;
- the formal incorporation of the principal purpose test (PPT) into Article 28 of the DTA, as provided for under the MLI.

The new DTA also includes a protocol which clarifies that the new treaty will not prevent Luxembourg from applying domestic controlled foreign corporation (CFC) rules to UK entities.

For more details, please refer to a report prepared by KPMG in Luxembourg.

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Netherlands

Updated DAC6 reporting instructions

In May 2022, the Dutch tax authorities published updated user instructions, which provide clarifications on how to file reports in relation to reportable rules cross-border arrangements (DAC6). The user instructions further provide information on how to access the DAC6 portal, how to monitor the status, as well as how to make corrections and deletions of submitted reports.

For more information, please refer to the Dutch tax authorities DAC6 web portal.

Proposed tax measures in 2022 Spring Memorandum

On May 20, 2022, the Dutch Government presented the 2022 Spring Memorandum to the House of Representatives, which envisages tax increases to finance relief measures compensating consumers for the increase in energy prices and defense military spending.

In particular, the Spring Memorandum proposes to reduce the step-up corporate income tax bracket (i.e. the portion of the taxable amount that is subject to the low corporate income tax rate of 15 percent) from EUR 395,000 to EUR 200,000 with effect from 2023. It is also expected that a global minimum corporate income tax rate of 15 percent will be introduced with effect from 2024 as part of the implementation of the OECD Pillar Two proposals.

In addition, the Memorandum considers the increase of the real estate transfer tax rate from 8 percent to 10.1 percent with effect from 2023 and the limitation of the tax relief (30 percent tax exemption on salary) for employees coming to the Netherlands who are recruited from abroad and have specific expertise that is scarce or unavailable in the Dutch labor market to the public sector pay cap (2022: EUR 216,000) with effect from 2024.

As a next step, the Government will present its final draft budget for 2023 on Budget Day in September 2022.

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

Portugal

New tax measures approved as part of 2022 Budget

On May 27, 2022, the Portuguese Parliament approved the Budget for 2022. Key corporate income tax measures include:

- Introduction of a new tax credit for investments in relation to the acquisition of tangible assets, non-consumable biological assets and intangibles, made between July 1, 2022 and December 31, 2022. Subject to certain conditions and limitation, the tax credit amounts to 10 percent of the eligible expenses incurred in the tax year (capped at the average of the eligible investments expenses incurred in the three previous tax years) and 25 percent of the eligible expenses exceeding the average of the three previous tax periods.
- Changes to the patent box regime by increasing the exemption of income from the transfer or temporary use of industrial property rights from 50 percent to 85 percent.
- Introduction of deduction limitations for expenses where entities have not submitted an activity

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commencement declaration.

Romania

Withholding tax reduction for capital gains earned through "intermediaries"

On May 23, 2022, a new law was published in the Romanian Official Gazette, which provides for a reduction of withholding tax on gains from the transfer of securities and derivatives involving intermediaries.

Depending on the holding period of such securities and derivatives, the regular withholding tax of 10 percent is reduced to either 1 percent (held for more than 365 days) or 3 percent (held for less than 365 days) and is then to be declared and paid by the respective intermediary involved in the transaction. The new rules apply from January 1, 2023.

For more details, please refer to a report prepared by KPMG in Romania.

Spain

Revised digital services tax return form published

On May 31, 2022, an updated version of the 490 tax form for the self-assessment in relation to the Spanish domestic digital services tax (DST) was published in the Official Gazette. The Spanish DST entered into force on January 16, 2021 and imposes a 3 percent tax on gross revenues arising from certain types digital services and subject to certain exemptions.

The new tax form will be applicable for the first time for self-assessments relating to the second quarter of 2022 (filing period starts on July 1, 2022).

For more information on the Spanish DST, please refer to E-News issue 122 and KPMG's development summary of the taxation of the digitalized economy.

United Kingdom

Deferral of the introduction of OECD Pillar Two minimum tax proposal

On June 14, 2022, the UK Financial Secretary published an open letter to respondents of the UK's consultation on the implementation of the OECD Pillar Two proposals, noting that the UK Government will confirm, as part of the Summer budgetary update, that domestic legislation to incorporate Pillar Two into UK law will first apply to accounting periods beginning on or after December 31, 2023. This will align the implementation date for Pillar Two in the UK will the implementation date that is proposed in the latest version of the EU Minimum Tax Directive compromise text (for information, please refer to Euro Tax Flash Issue 470).

The letter from the Financial Secretary notes that the intention is to provide businesses with an appropriate lead-in time before implementation and allow the policy to benefit from progress on the Pillar Two proposals internationally.

For more details, please refer to KPMG's Tax News Flash.

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Energy Profits Levy on extraordinary oil and gas profits announced

On May 26, 2022, the UK Government announced a new tax on the profits of oil and gas companies operating in the UK and the UK Continental Shelf. The Energy Profits Levy will be charged at a rate of 25 percent and will apply to profits arising on or after May 26, 2022. Alongside the Levy, the UK Chancellor also announced an 80 percent investment allowance for certain expenditure to incentivize investment in UK extraction and to support energy security.

The Levy is intended to be temporary in nature and will be phased out when oil and gas prices return to historically more normal levels. The legislation will also include a sunset clause which will remove the Levy after December 31, 2025.

For more details, please refer to a report prepared by KPMG in the UK.

Introduction of reporting rules for digital platforms

On May 19, 2022, the UK tax authorities (HMRC) announced that, following a consultation on the implementation of the OECD's Model 'Reporting Rules for Digital Platforms', the UK's new reporting rules for digital platforms will be delayed by one year and will start from January 1, 2024, with submission of the first reports due by the end of January 2025. The change is intended to give platforms and their advisors time to prepare for the implementation of the new rules.

Expansion of Investment Transactions List

On May 23, 2022, HMRC opened a new public consultation on the potential expansion of the Investment Transactions List (ITL) for the UK's Investment Management Exemption (IME) and other fund tax regimes. The publication of the consultation follows the Government's announcement on April 4, 2022, to expand the ITL used for the IME to provide tax certainty for investment managers that wished to include crypto-assets within investment portfolios. The consultation asks for stakeholder views on the types of crypto-assets which should be included within the ITL for both the IME and other fund tax regimes. The consultation will close on July 18, 2022.

For more updates on recent UK tax developments, please refer to a report prepared by KPMG in the UK.

Local Courts

Denmark

Danish court decision regarding the beneficial ownership concept for interest payments (Interest and Royalty Directive)

On May 19, 2022, the Danish Western High Court ruled in a case on the withholding tax exemption benefit under the EU Interest and Royalties Directive (C-299/16). The case is part of the four joined Danish cases, namely N Luxembourg 1 (C-115/16), X Denmark (C-118/16) and C Denmark 1 (C-119/16) and Z Denmark case (C-299/16) on the concept of beneficial ownership for interest payments. The case concerns a back-to-back financing transaction, under which a Danish resident subsidiary is

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financed by its non-resident parent company via a series of loans granted to an intermediary holding company resident in another EU Member State.

The Danish company requested an exemption from the Danish withholding tax levied on the payments made to the EU financing company based on the EU Interest and Royalties Directive. The Danish tax authorities denied the exemption, arguing that the company receiving the income was part of a conduit structure and could not be considered the beneficial owner of the payment. The cases made its way through the Danish courts and was eventually referred to the CJEU. The CJEU concluded on February 26, 2019 that it is for the referring court to assess whether the arrangements under review constitute an abuse under EU law, taking into account in particular the existence of a conduit company (for more details, please refer to Euro Tax Flash Issue 396).

The Danish Western High Court ruled in favor of the tax authorities, arguing that the structure represents an abuse of the Interest and Royalties directive and that the benefits should therefore be denied.

France

French court decision regarding the beneficial ownership concept for royalty payments (treaty benefits)

On May 20, 2022, the French high administrative court ("Conseil d'Etat") issued a decision on the applicability of treaty benefits for royalty payments performed to companies that were not the beneficial owners of the income.

The case concerned royalty payments performed by a French company to a Belgian and a Maltese company, for the use of intangibles developed by a company established in New Zealand. The French tax authorities challenged the applicability of the double tax treaties concluded with Belgium and Malta, on the grounds that the recipients were not the beneficial owners of the payments. Instead, the tax authorities applied the 10 percent withholding tax rate provided by the double tax treaty concluded between France and New Zealand.

Following several appeals, the Conseil d'Etat upheld the approach taken by the tax authorities and ruled that where the recipient of the payment is not the beneficial owner of the income, the tax authorities may apply the provisions of a double tax treat with a third country, where the actual beneficial owner is resident.

Germany

Withholding tax on right to use know-how for an unlimited period of time

On October 13, 2021, the German Federal Tax Court (the Court) issued a decision in a case concerning the right to use know-how for an unlimited period of time. The plaintiff is a German taxpayer that acquired in 2007, from a Hungarian company, the unlimited right to use pharmaceutical know-how, i.e. all information and related documentation to produce a certain pharmaceutical product, developed by the Hungarian company. In turn, the Hungarian company agreed not to convey the information process to third parties. Following disagreements between the parties, the contractual relationship was terminated during 2009.

The German tax authorities claimed that withholding tax should have been withheld by the German taxpayer for the payments made to the Hungarian company. Following an appeal by the taxpayer, the Court upheld the tax authorities' opinion. In short, the Court noted that whilst the sale of know-how was outside the scope of the German withholding tax, the agreement was nevertheless concluded for the

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right to use the know-how, for an unlimited period of time, which was within the scope of withholding tax. Moreover, in the Court's view, the requirement to 'actual use' the know-how in Germany was met despite the contractual disagreements between the parties.

For more details, please refer to a report prepared by KPMG in Germany.

Netherlands

Dutch court decision regarding the beneficial ownership concept for dividend payments (Parent Subsidiary Directive)

On May 4, 2022, the Dutch Zeeland-West Brabant District Court (the Court) issued its decision in a case regarding the applicability of the EU Parent Subsidiary Directive for payments performed to a Luxembourg holding company. The case concerns a Dutch taxpayer, that distributed dividends to a Luxembourg holding company (15.4 percent shareholding). The Luxembourg company was held by a non-EU private equity fund. Following a tax audit, the Dutch tax authorities noted that the Dutch company's initial direct shareholder was a limited partnership, set-up in the Cayman Islands. The shares in the Dutch company were transferred to the Luxembourg company shortly before the first dividend distribution took place, and the Luxembourg company was dissolved after its last dividend distribution. Based on these facts, the tax authorities held that the Luxembourg company was not the beneficial owner of the royalties, and that it was interposed in the structure with the aim of reducing the withholding tax burden in the Netherlands. Consequently, the relief available under the Parent Subsidiary directive was denied.

The Court recalled the indicators of abuse outlined in the Danish cases - in particular case T Denmark, (C-116/16), including the date when the entity was set-up, the existence of own premises and own personnel, and the time period between the moment when the dividends received from the Dutch subsidiary and the moment when the income was re-distributed to its non-EU shareholder. Based on these criteria, the Court concluded that the Luxembourg holding company could not be regarded as the beneficial owner of the dividends. In the Court's view, the Luxembourg company was interposed in the structure with the purpose of avoiding withholding tax, and therefore constituted an abuse of law which should trigger the non-applicability of the Parent Subsidiary relief.

The Court also noted that the CJEU decisions in the Danish cases were issued after the payments under dispute were performed. As such, in the Court's view, it would be reasonable to assume that the payer was not aware that tax should be withheld from the dividends paid. The Court held therefore that the underpayment of dividend withholding tax was not intentional, and annulled the penalties imposed by the Dutch tax authorities.

Poland

Sale of debts deducted as unrecoverable triggers adjustments to tax-deductible costs

On May 19, 2022, the Polish Supreme Administrative Court held that sold debt can no longer benefit from the beneficial provisions that allowed the deductibility for corporate income tax purposes of unrecoverable debt. The related expenses can nevertheless be deducted subject to the provisions applicable to sold debt. Therefore, companies that benefited from tax deduction on the grounds that the debt was not recoverable, need to adjust their tax-deductible expenses if the debt is eventually sold.

For more details, please refer to a report prepared by KPMG in Poland.

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KPMG Insights

EU Financial Services Tax perspectives

As countries across the EU and Europe continue to introduce new legislation and adopt tax reforms in support of economic growth and investment, multinationals operating across the region should continue to adapt to the ever-changing tax landscape. Coupled with the shift to digital and the persistent desire to improve efficiencies, banks, insurers and asset managers are radically transforming their business models to respond to these changes, giving rise to both challenges and opportunities.

So what is on the horizon? Will the tax landscape become even more volatile in the future, and what does this mean for financial services institutions?

On June 29, 2022, KPMG will hold a webcast where a closer look is taken at some of the latest proposals that have risen to the top of the European tax agenda. The panel of KPMG tax specialists will share their insights on some of the latest developments impacting the financial services industry including:

- EU update — BEPS Pillar 2 draft directive, European withholding tax — response to latest consultation, ATAD 3 update, DEBRA and much more
- Tax controversy — Approaches being taken by different tax authorities across Europe
- Crypto currency — The developing picture of tax treatment and tax information reporting for crypto transactions across Europe

Please access the event page to register.

Future of Tax & Legal Technology and Innovation Event

With a confluence of disruptors changing the global tax and regulatory landscape, tax leaders and their departments are pressured to reimagine their functions through new technologies and nimble operating models, with a greater focus on turning data into value. Getting this right can enable tax functions and their organizations to rise to the demands of our globally connected and hyper-digitalized world, to move from keeping pace to thriving in a new normal.

The Future of Tax & Legal technology and innovation event on June 1, 2022 provided the opportunity to explore tax reimagined and will feature leading innovators from Microsoft and KPMG. Together, we explored tax reimagined, unpacked the drivers and levers of innovation, shared real stories of transformation from business leaders like you, and revealed new technologies built on the KPMG Digital Gateway Platform, powered by Microsoft.

Please access the event page for a replay of the webcast.

The path to tax transparency in the Nordics

Transparent communication has never been more important in the world of tax. A decisive factor in maintaining and improving a reputation as a company solely depends on transparent communication

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with stakeholders. In recent years, tax has gone from being a specialised and technical topic to being recognised as a key lever of sustainability efforts, while companies' tax behaviour often is scrutinised.

In a joint study, KPMG in Denmark, Finland, Iceland, Norway and Sweden have conducted an analysis of 100+ companies found in each country's national market index giving great insights into the current state of tax transparency in the Nordics and for each country individually. In the report, it is shown that one can expect a majority of large MNEs to publish tax disclosures on an annual basis, with both a qualitative and a quantitative component even before the EU Public CbCR Directive enters into force.

For more information, please refer to the KPMG tax transparency and GRI 207 benchmark report.

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