


## E-News from the EU Tax Centre

**Issue 162 – October 4, 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.

Today's edition includes updates on:

- **CJEU:** Decision on the recovery of Gibraltar State aid
- **CJEU:** Germany not required to allow for cross-border loss relief if revenues were exempt based on a treaty
- **General Court:** Decision on Madeira Free Zone State aid scheme
- **CJEU Referral:** Commission refers Malta to the CJEU regarding its investor citizenship scheme
- **CJEU Referrals:** Belgian Constitutional Court updated request for a preliminary ruling concerning DAC6
- **European Parliament:** ECON sub-committee exchange of views with Commissioner Gentiloni
- **Germany:** Lower tax court decision on German anti-treaty/-directive shopping rule
- **Ireland:** Tax measures announced as part of the 2023 Budget
- **Lithuania:** Implementation of DAC7
- **Netherlands**: Tax measures announced as part of the 2023 Budget
- **United Kingdom**: UK government unveils mini budget providing for various tax relief measures

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## Latest CJEU, EFTA and ECHR

### CJEU

#### Decision on the recovery of Gibraltar State aid

On September 15, 2022, the Court of Justice of the European Union (CJEU or the Court) gave its decision in a case concerning the applicability of domestic double tax relief provisions in the context of recovering unlawful State aid (C-705/20).

The Court held that EU law does not preclude tax authorities responsible for the recovery of unlawful State aid from reducing the recoverable amount by crediting the taxes paid abroad against taxes that were due locally, provided that the tax credit was granted based on rules applicable at the time when the taxpayer benefited from the State aid.

For more details, please refer to Euro Tax Flash Issue 484.

#### Germany not required to allow for cross-border loss relief if revenues were exempt based on a treaty

On September 22, 2022, the CJEU decided in a case concerning the compatibility of the German cross-border loss relief rules with EU law. As reported in E-News Issue 150, the plaintiff was a German taxpayer whose UK permanent establishment incurred losses. The losses were not deductible in Germany as the double treaty concluded between the two countries provides for the exemption method to avoid double taxation.

In line with the Advocate General (AG) Collins' recommendation, the Court found that a Member State is not precluded from denying the deduction of final losses incurred by a foreign permanent establishment from the taxable profits of its resident head-office, where the state of residence has waived its power to tax the profits (and losses) of its permanent establishment under a double tax treaty.

For more details, please refer to Euro Tax Flash Issue 486.

### General Court

#### Decision on Madeira Free Zone State aid scheme

On September 21, 2022, the General Court of the European Union (General Court or the Court) gave its decision in the case T-95/21 regarding the Madeira Free Zone State aid scheme.

The Court ruled that the Commission was correct to conclude that the Madeira Free Zone State aid scheme (Regime III) – the objective of which was to contribute to the economic development of the outermost region of Madeira through tax incentives, was not implemented in line with approved conditions. Consequently, the General Court dismissed the appeal brought by Portugal against the Commission's decision.

For more details, please refer to Euro Tax Flash Issue 485.

## Infringement Procedures and CJEU Referrals

### Infringement Procedures

#### Commission closes infringement procedures against Czech Republic, Cyprus and Spain

On September 29, 2022, the European Commission closed infringement proceedings against Cyprus and Spain in respect of a failure to fully transpose into domestic law Council Directive (EU) 2017/1852 on tax dispute resolution mechanism in the European Union and Council Directive 2016/1164 (ATAD I). In addition, the Commission closed infringement proceedings against the Czech Republic relating to an incomplete local transposition of Council Directive 2017/952 (ATAD II).

As previously reported, the Commission had previously sent letters of formal notice / reasoned opinions to the three jurisdictions (for more details, please refer to E-News Issues 112 and 140). According to the Commission's release, the infringement procedures were closed following a complete notification of the respective transposing measures by all three jurisdictions.

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

### CJEU Referrals

#### Commission refers Malta to the CJEU regarding its investor citizenship scheme

On September 29, 2022, the European Commission referred Malta to the CJEU in respect of its citizenship scheme (also called "golden passport" scheme).

On April 6, 2022, the European Commission had sent a reasoned opinion to Malta in respect of its investor citizenship scheme. The Commission's reasoned opinion stated that the granting of EU citizenship in return for pre-determined investments or payments (with no genuine link to the Member State) is incompatible with EU law, notably Article 4(3) of the Treaty on European Union (TEU) and Article 20 of the Treaty on the Functioning of the European Union (TFEU). Please see E-News Issue 152 for more details on the Commission's April 2022 infringement package.

Following Russia's invasion of Ukraine, Malta suspended the scheme for Russian and Belarusian nationals while continuing the scheme for all other nationalities. As Malta has not expressed any intention to end the scheme and did not satisfactorily address the Commission's concerns, the Commission decided to refer the case to the CJEU.

For more details, please refer to the European Commission press release.

#### Belgian Constitutional Court updated request for a preliminary ruling concerning DAC6

On September 15, 2022, the Belgian Constitutional Court ruled (FR/NL) in the joint cases of Belgian lawyers and the Institute of Tax Advisors and Accountants concerning the implementation of the DAC6 Directive (2018/822 EU) into Belgian legislation. The decision follows a previous referral from the Belgian Court (C-694/20), which is still pending in front of the CJEU (for more details, please refer to Euro Tax Flash Issue 472).

In the new judgement, the Belgian Constitutional Court acknowledged the application of legal professional privilege for lawyers, tax advisors and accountants, and annulled the "unprivileged" periodic reporting of marketable arrangements. In addition, the Belgian court raised several additional questions to the CJEU in light of the meaning and objective of such privilege, including whether:

- the DAC6 reporting obligations infringe the principle of equality and non-discrimination protected under article 6(3) of the Treaty on the Functioning of the European Union (TFEU) and articles 20 and 21 of the EU Charter of Fundamental Rights, respectively;
- the use of key terms / deadlines that are not sufficiently clear and precise infringe the principle of legality in criminal cases and the general principle of legal certainty and the right to respect for private life, protected under article 49(1) and article 7 of the EU Charter of Fundamental Rights and article 8 of the European Convention on Human Rights. These terms include "arrangement", "intermediary", "participant", "associated enterprise", the qualification of "cross-border", the different "hallmarks", the "main benefit test" and the trigger date for the 30 days reporting period.

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

## EU Institutions

### European Commission

#### Plans to put forward BEFIT proposal

As part of the 2022 State of the Union Address of September 14, 2022, the President of the European Commission (Ursula von der Leyen) informed the European Parliament that the Commission intends to put forward a relief package for small and mid-sized enterprises (SME) that will include a proposal for a single set of tax rules, called Business in Europe: Framework for Income Taxation (BEFIT). The President noted that such measure would reduce bureaucracy and simplify doing business in the EU.

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

### European Parliament

#### ECON sub-committee exchange of views with Commissioner Gentiloni

On September 26, 2022, the European Parliament's sub-committee on economic and monetary affairs (ECON) held a public exchange of views with the European Commissioner for Economy, Mr. Paolo Gentiloni. The meeting touched on a range of different initiatives, including:

- *Proposal for a solidarity contribution on surplus profits in the fossil sector:* with regard to the European Commission's (EC) proposal for a temporary solidarity contribution (part of the proposed Council Regulation on an emergency intervention to address high energy prices – Euro Tax Flash Issue 483), the Commissioner noted that the proposal does not intend to have a retroactive effect on profits generated in 2021 and shall be limited to companies and permanent establishments that are considered to be resident in an EU Member State for tax purposes and that perform activities in the oil, gas, coal and refinery sectors. The Commissioner also noted the EC estimates that the solidarity contribution will be applicable to approximately 900 companies based on an entity-by-entity approach, i.e. the proposal will also apply to EU-based subsidiaries of non-EU headquartered groups.

- *Progress on the Minimum Tax Directive*: Commissioner Gentiloni stressed that the Commission remains fully committed to pressing ahead with the proposed Minimum Tax Directive and reassured the EP that the EC will continue to pursue unanimous approval of the proposal by the end of the Czech Presidency while stressing that there are also other legal and political means to overcome the veto of Member States.
- *Upcoming proposal for a Directive securing the activity framework of enablers (SAFE):* As regards measures to complement the Unshell Directive proposal, Commissioner Gentiloni referred to the upcoming initiative on tackling the role of enablers involved in facilitating tax evasion and aggressive tax planning through the use of complex structures in third countries. According to an information paper published by the Commission on September 13, 2022, the current indicative timing for the Commission's adoption of the proposal is first half of 2023. The proposal is currently going through public consultation.
- *Upcoming proposal for Business in Europe: Framework for Income Taxation (BEFIT):* Commissioner Gentiloni made reference to the announcement of President of the European Commission in relation to the upcoming proposal for a single set of tax rules, called Business in Europe: Framework for Income Taxation (BEFIT). According to the Commissioner, the proposal is scheduled to be published in the coming months and will build on the previous CCTB proposal as well as on the principles agreed as part of the OECD BEPS 2.0 initiative with a view to provide for simpler and more effective corporate taxation in the EU.
- *Recommendation on aggressive tax planning for individual Member States:* Commissioner Gentiloni noted that the Commission has observed different levels of responses from the six Member States that received country-specific recommendations to curb aggressive tax planning as part of the Commission's recovery and resilience facility (for more details, please refer to E-News Issue 156). The Commissioner highlighted some positive evolutions in the Netherlands in this regard but stressed that further steps need to be taken, for example, in Luxembourg and that the EC is only willing to authorize payments under the recovery and resilience facility where commitments have been fulfilled.

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

## OECD and other International Institutions

### OECD

#### Release of 2022 report on tax policy reforms

On September 21, 2022, the OECD released the 2022 edition of the report on local tax reforms that were introduced or announced in 2021. The report covers 71 jurisdictions in total and finds that tax policy reforms (such as reductions in taxes on labor and more generous corporate tax incentives) play an important role for countries in order to support economic recovery and provide relief from rising inflation and energy prices. In this regard, the report provides an overview of government responses to rising energy prices in the second half of 2021 and the first half of 2022 and outlines policy recommendations to governments going forward.

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

#### Release of Stage 2 peer review reports on dispute resolution for thirteen jurisdictions

On September 13, 2022, the OECD published Stage 2 peer review monitoring reports under BEPS Action 14 for Aruba, Bahrain, Barbados, Gibraltar, Greenland, Kazakhstan, Oman, Qatar, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, United Arab Emirates and Viet Nam.

The reports evaluated the progress made by these thirteen jurisdictions in implementing the recommendations resulting from their Stage 1 peer review, take into account any developments in the period from January 1, 2020 to October 31, 2021 and build on the Mutual Agreement Procedure (MAP) statistics for 2016-2020.

In particular, the release notes that Bahrain, Barbados, Kazakhstan, Oman, Qatar, Thailand, the United Arab Emirates and Viet Nam have signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the Multilateral Instrument -"MLI").

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

### Update on BEPS MLI

On September 16, 2022, Bulgaria deposited its instrument of ratification for the Multilateral Instrument. The MLI will enter into force on January 1, 2023 for Bulgaria.

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

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## Local Law and Regulations

### Belgium

#### Notional interest deduction for assessment year 2023

On September 19, 2022, the Belgian government issued a decree clarifying that the notional interest deduction rate for the assessment year 2023 is 0 percent (0.443 percent for SMEs).

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

### Bulgaria

#### Public consultation on draft legislation to align investment incentives with EU State aid guidelines

On September 5, 2022, the Bulgarian Ministry of Finance published draft legislation to align current tax incentives in relation to municipalities with a high unemployment rate with the European Commission's guidelines on regional State aid (2021/C 153/01).

The Bulgarian law currently provides for a partial or full remittance of corporate income tax for taxpayers that perform manufacturing activities in municipalities with an unemployment rate that is 25 percent higher than the national average. The amendments would bring additional sectors in scope of this incentive, while at the same time limiting the scope to micro, small and medium-sized enterprises.

The new rules would be effective for the period 2022 to 2027 subject to the Commission's approval. As a next step, stakeholders are invited to comment on the draft legislation until October 5, 2022.

## Czech Republic

### Working paper on windfall profit taxation released

The Czech government released a working paper proposing the introduction of a tax on extraordinary profits (windfall tax) in the energy and banking sectors and, possibly, in fuel production and distribution. Extraordinary profits would be determined as the difference between the current year's tax base and the average tax base for the preceding five years and would be subject to an additional tax at 40 percent, 50 percent, or 60 percent.

As a next step, the working paper will be discussed with the National Economic Council of the Government (NERV) and used as a basis for drafting a bill.

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

## Denmark

### Withholding tax on dividend payments from foreign states and state entities proposed

On September 23, 2022, the Danish government issued a proposal providing for the introduction of a 27 percent withholding tax on dividend payments to foreign states that invest directly or indirectly or via departments that are integral parts of the state or government. The final tax rate for such institutions would be set at 22 percent. Under current Danish tax law, foreign states and related institutions are exempt from Danish tax on dividends.

The new withholding tax would be applicable for dividend payments made on or after March 1, 2023. A reduction of withholding tax to the 22 percent final tax rate or a lower rate under a tax treaty would be available through a refund procedure.

## Iceland

### Public consultation on proposed R&D tax incentives

On September 14, 2022, the Ministry of Finance and Economic Affairs in Iceland published a proposal for new tax incentives for companies involved in innovation and research and development (R&D) including:

- increased reimbursements for R&D expenses; and
- revised taxation of stock options and shares of start-ups and innovative companies.

Stakeholders were invited to make comments on the proposed measures as part of a public consultation that was held until September 23, 2022.

## Ireland

### Tax measures announced as part of the 2023 Budget

On September 27, 2022, the Irish government presented the 2023 Budget package, which includes the following key business tax topics:

- commitment to continue work on developing the elements needed to give effect to the 15 percent minimum effective tax rate (the OECD's Pillar Two solution) in tandem with considerations to introduce a territorial system of corporation tax;
- changes to the research and development (R&D) tax credit to align with the OECD's definitions of refundable tax credits;
- extension of the knowledge development box regime for a further four years – until 2027;
- introduction of a temporary business energy support scheme to help certain trading businesses suffering an increase in energy costs of more than 50 percent in 2022 compared with 2021;
- extension of the film corporation tax credit beyond the current end date of 2024 to December 2028;
- extension of the key employee engagement program to the end of 2025 with further changes to be introduced following European Commission approval;
- extension of the bank levy to 2023 (previously due to expire in 2022);
- increase of the carbon tax rate by EUR 7.50 per ton from EUR 41 to EUR 48,5 in respect of auto-fuels to apply from October 12, 2022, but expectation that the increase will be offset by an equal reduction in the national oils reserve agency levy.

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

### Guidance on the attribution of profits to a permanent establishment

On September 7, 2022, the Irish Revenue published guidance for the purpose of computing the profits of an Irish branch of a non-resident company. The guidance provides clarifications in respect of the Irish transfer pricing rules that were revised as part of the Finance Act 2021 (for previous coverage, please refer to E-News Issue 141).

In line with the Authorized OECD Approach (AOA) codified in Article 7(2) of the OECD Model Tax Convention, the Irish guidance requires in a first step a functional and factual analysis to attribute assets, risks and "free" capital to the permanent establishment, which is deemed to be a distinct and separate enterprise. In a second step, the remuneration of any dealings recognized between the permanent establishment and its head office is determined by applying the arm's length principle.

The revised transfer pricing rules are applicable for accounting periods beginning on or after January 1, 2022.

## Italy

### New tax credits for companies suffering from high energy prices gazetted

On September 23, 2022, an additional tax measures package was published in the Italian Official Gazette to support taxpayers suffering from high energy prices and inflation. The package includes the extension and increase of tax credit in relation to energy consumption. The credit amounts to 30 percent or 40 percent (depending on certain criteria) of energy costs, respectively 40 percent of natural gas costs incurred in October and November 2022 for eligible companies (with high energy/natural gas consumption), subject to certain conditions. For the period July to September the tax credit equaled 15 percent or 25 percent, depending on certain criteria, of the above mentioned costs.

As a next step, the law decree must be passed by the parliament (with possible amendments) within 60 days from its publication.

## Lithuania

### Implementation of DAC7

On September 7, 2022, the Lithuanian government published a draft law to transpose the Council Directive (EU) 2021/514 (DAC7) into domestic legislation. The law would require digital platform operators to provide the Lithuanian tax authorities with information about certain users ("sellers") on their platform to enable the Lithuanian tax authorities to exchange this information with other EU Member States. Member States are required to implement DAC7 by December 31, 2022 and apply the rules with effect from January 1, 2023, with the first reporting required by January 31, 2024.

## Netherlands

### Tax measures announced as part of the 2023 Budget

On September 20, 2022, the Dutch government presented the 2023 Tax Plan package to the Lower House of Parliament. Key tax measures include:

- *Corporate income tax step-up*: The taxable amount that is subject to the low corporate income tax rate will be reduced from EUR 395,000 to EUR 200,000 ('SME bracket'). It has also been proposed to increase the tax rate in this bracket (the 'SME tax rate') from 15 percent to 19 percent with effect from 2023. The regular corporate income tax will stay at 25.8 percent.
- *Limitation of the tax relief for expatriates*: The tax relief in the form of a 30 percent tax exemption on salary for employees recruited from abroad and that have specific expertise that is scarce or unavailable in the Dutch labor market will be limited to the public sector pay cap (2022: EUR 216,000) with effect from 2024 subject to certain transitional rules.
- *Introduction of a minimum carbon price for industrial emissions*: The current tax levied on carbon emissions relating to the generation of electricity will be complemented by a minimum carbon price on (other) industrial emissions that are exempt under the current carbon tax. This tax becomes due when the price under the EU emissions trading system (EU ETS) drops below a pre-defined minimum price. The new minimum carbon price, exclusive of the reduction by the EU ETS forward price, will rise linearly from EUR 16.40 in 2023 to EUR 31.90 per ton of carbon equivalent in 2030. This is lower than the existing carbon tax, which will increase linearly from EUR 52.62 in 2023 to EUR 128.71 per ton of carbon equivalent in 2030.
- *Introduction of a windfall levy:* In response to a statement issued by the Lower House of the Dutch Parliament, the government has added to the budget a proposal for a windfall profit levy on revenues derived from the sale of natural gas at a price exceeding EUR 0.50 per m3. The levy would apply on a temporary basis for revenues derived in 2023 and 2024. However, it remains to be seen how this proposal might evolve in light of the European Commission's proposal for a solidarity contribution on surplus profits in the fossil sector.

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

### Lower House of Dutch Parliament passes bill on excessive borrowing from a taxpayer's own companies

On September 13, 2022, the Lower House of the Dutch Parliament passed a bill providing for the taxation of excessive borrowing from a taxpayer's own companies. In short, holders of a substantial interest who borrow more than EUR 700,000 from their own company will be taxed on the excess as income from a substantial interest, subject to certain exceptions. The measure will apply for the first time with respect to the 2023 calendar year and will take into account the level of debt as at December 31, 2023.

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

#### Proposed amendments to the DAC7 transposition bill

On September 15, 2022, the Dutch government issued a proposal for amendments to the bill transposing the Council Directive (EU) 2021/514 (DAC7) into domestic law. The proposed amendments include:

- a clarification that no reporting obligations shall exist in a Member State where a digital platform operator is subject to reporting obligations in another Member State;
- an alignment with the OECD's Model Reporting Rules for Digital Platforms in relation to the location of the seller and the information that need to be disclosed by the platform operator; and
- an extension of the reporting obligations to purely domestic situations.

For previous coverage, please refer to E-News Issue 152.

### United Kingdom

#### UK government unveils mini budget providing for various tax relief measures

On September 23, 2022, the UK government unveiled a “growth plan” that would aim to address high energy costs and inflation and deliver higher productivity and wages. The plan provides for various tax relief measures including a decision to cancel the previously announced increase of the corporation tax rate (keeping the rate at 19 percent) and the scheduled decrease of the bank corporation tax surcharge (keeping the rate at 8 percent). In addition, the mini budget aims to cancel the planned increase in diverted profits tax to 31 percent (keeping the rate at 25 percent).

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

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## Local Courts

### Germany

#### Lower tax court decision on German anti-treaty/directive shopping rule

On February 16, 2022, the Lower Tax Court of Cologne (Court) issued a decision confirming that a forwarding of dividends precludes the application for full exemption of German withholding tax under the old and new version of the German anti-treat/directive shopping provisions where the recipient does not carry out significant economic activity and cannot provide substantial non-tax reasons for its interposition.

The plaintiff was a Spanish corporation that held all shares in a German limited liability company. The plaintiff held German real estate trough the German company and forwarded dividends received from the German company directly to its two Spanish owner-managers (individuals). The plaintiff had no office premises of its own and only had one employee resident in Germany. The plaintiff requested an certificate for withholding tax exemption in Germany, which was rejected by the German tax authorities.

The Court upheld the decision of the tax authorities, arguing that the plaintiff had not been able to prove sufficient own economic activity and that its interposition between the German company and the Spanish owner-managers was a purely artificial arrangement for purpose of obtaining a tax advantage. Under consideration that the two owner-managers had only been entitled to a 15 percent relief under the double tax treaty between Germany and Spain, the plaintiff was not able to prove that none of the main purposes of its involvement was to obtain a tax advantage.

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

## KPMG Insights

### Business consequences of tax driving net zero ambitions

Tackling climate change is a key issue that has become more pressing than ever, with the fuel price increases and growing uncertainty caused by the Russian invasion of Ukraine.

There are many questions to address:

- How fast will changes be made?
- To what extent will tax be used as a stick or a carrot?
- What impact will taxes or regulation have on business? How will these interact with each other?

For more information on measures which governments might introduce — in particular tax related ones — and the potential impact on business, please refer to a report prepared by KPMG International.

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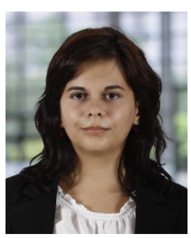

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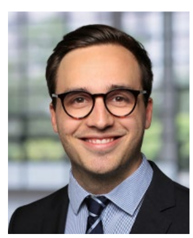

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### Key links

- Visit our website for earlier editions

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